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Chairman: Mr. LEHMANN (Denmark)

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The meeting was called to order at 10.10 a.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

1. Mr. AL-BAHARNA (Bahrain), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that, for the practical reasons cited in the thirteenth report of the Special Rapporteur, his delegation was inclined to support the reduced list of crimes contained in the latest version of the draft Code. He shared the view that it would be necessary to harmonize the provisions of the draft Code with the draft statute for an international criminal court; that each crime characterized in the Code should be defined separately; and that the Code would only be effective if it included crimes, penalties and jurisdiction. He therefore did not support the suggestion made in paragraph 124 of the Commission's report that "it would be sufficient to prescribe an upper limit for all the crimes, leaving it to the courts to determine the penalty in each particular case".

2. He also supported the Special Rapporteur's view that the Code should not rely unduly on existing treaties because it dealt with crimes which constituted violations of jus cogens; that a consensus had clearly developed in the Commission in favour of including at least four crimes in the draft Code (aggression, genocide, crimes against humanity and war crimes); and that there was ample justification for deleting the draft articles on intervention, threat of aggression and recruitment of mercenaries. He endorsed the Special Rapporteur's proposal that the crime of apartheid should be included in draft article 20 ("institutionalized racial discrimination") and that colonial domination should be included as an international crime under article 19 of part one of the draft articles on State responsibility. He trusted that the question of deleting the draft articles on "international terrorism" and "illicit traffic in narcotic drugs" would not arise in the future.

3. Regarding draft article 15, his delegation believed that the text adopted on first reading contained elements that could be included in a definition of the crime of aggression. However, subparagraphs (a) to (g) of paragraph 4 were unnecessary. A comprehensive definition should not include exhaustive lists of examples but confine itself to indicating the constituent elements of the crime, thereafter leaving it to the court to determine whether the definition applied or not in a particular case. Subparagraph (h) had the disadvantage of appearing to impose in advance upon a judicial organ, namely the court, a decision taken by a political organ, namely the Security Council, especially if read in conjunction with paragraph 5.

4. The new definition of "aggression" was precise and satisfactory. His delegation therefore disagreed with those who had stated that it was too general for the purposes of criminal law. He welcomed the stylistic improvement in paragraph 1 of the definition and said that the same amendment should be made in paragraph 1 of articles 21, 22, 24 and 25 in order to ensure consistency. In any case, paragraph 2 had expressed with the necessary clarity what constituted aggression - namely material use of armed force by a State against another State - and therefore he objected to the wording "an act of aggression under

international law" which, apart from being redundant since the paragraph had already defined aggression as "the use of armed force ... in a manner inconsistent with the Charter", would also introduce an element of confusion.

5. With regard to article 19, his delegation believed that the crime of genocide should be included in the draft Code of Crimes and should be defined on the basis of the widely accepted definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide. He endorsed the inclusion of the additional paragraph 3 on incitement to commit genocide and paragraph 4 on attempts to commit genocide. Given the seriousness of the crime, he believed that the draft Code should contain a provision similar to article IX of the genocide Convention which conferred compulsory jurisdiction upon the future International Criminal Court in respect of genocide.

6. The phrase "in a systematic manner or on a mass scale", which had appeared in the text of draft article 21 adopted on first reading, had been deleted from the revised text of the draft article, although the second paragraph stated that "a crime against humanity means the systematic commission of any of the following acts". He believed that further emphasis should be given to the seriousness and mass character of such crimes in the commentary on the draft article. Otherwise the new wording was an improvement on the previous draft and his delegation found it broadly acceptable.

7. Regarding draft article 22, his delegation endorsed the proposal to revert to the traditional wording "war crimes" in place of the formula "exceptionally serious war crimes" which had appeared in the previous version, and to delete the words "exceptionally serious" which had appeared in paragraph 1 of that version. The reference to the Geneva Conventions which had been included in the new version in preference to the expression "international humanitarian law", which had been vague and too generalized, had tightened up the definition. The Commission should reconsider its decision to delete paragraph 2, subparagraph (b) of the previous draft referring to "establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory". He supported the inclusion of the word "serious" in the introductory sentence of paragraph 2 and a non-exhaustive list in paragraph 2.

8. Bahrain supported the Special Rapporteur's view that the inclusion of international terrorism in the draft Code would not affect the ability of the Security Council to take measures in response to situations constituting a threat to international peace and security. The Bahraini delegation shared the view that international terrorism could constitute a crime against the peace and security of mankind when the terrorist acts were particularly grave and massive in character. He therefore suggested that consideration should be given to the inclusion of international terrorism as a crime under the draft Code. The word "terror" in paragraph 2 was preferable to the words between square brackets and he proposed their deletion.

9. Finally, with regard to the much discussed draft article 25, his delegation shared the view expressed in paragraph 113 of the Commission's report that, in view of the existence of the 1988 United Nations Convention on the subject of drug trafficking, before deciding whether or not to include that draft article in the Code, consideration should be given to the relationship between the

jurisdiction of national legal systems under that Convention and the proposed international jurisdiction under the Code. He welcomed the inclusion of the words "on a large scale" and "or in a transboundary context" in paragraph 1, but felt that the reason for the deletion of the words "within the confines of a State" should be given in the commentary. The reason for the omission of any reference to individuals who were involved in illicit drug trafficking in their capacity as agents or representatives of a State should also be explained.

10. Mr. ROBINSON (Jamaica) said that the list of crimes against the peace and security of mankind had been too drastically reduced, reflecting the Commission's tendency to concentrate more on codification than on the progressive development of international law. To omit such crimes as apartheid and colonial domination, on the basis that they were now only of historical interest, would be to take a great risk. Moreover, there were sufficient grounds for including in the Code the concept of intervention and that of wilful and severe damage to the environment. A compromise formula might be to include a provision for formulating amendments whereby a crime might be added to or taken out of the list of crimes; that would make it possible to take account of developments in the world community.

11. There was an inextricable linkage between the conclusion of the Code and the establishment of an international criminal jurisdiction. He had no doubt that the Code would be better implemented by an international criminal court than by national courts.

12. He supported draft article 1 and suggested that it should read as follows: "The Code defines crimes which by reason of their exceptional gravity and the international concern they engender, constitute crimes against the peace and security of mankind", or "The Code applies to crimes of exceptional gravity and international concern which, as defined herein, constitute crimes against the peace and security of mankind".

13. The twin elements of exceptional gravity and international concern were useful in defining particular crimes; the definition of a particular crime might still require express reference to one or both of those elements.

14. Article 2 should reflect the principle that the characterization of an act as a crime against the peace and security of mankind resulted from the application of international law and was independent of internal law.

15. His delegation favoured the inclusion in article 3 of a reference to intent since it was necessary to reflect the requirement of mens rea as a general principle. The formulation of that principle should, however, make allowance for exceptional cases of strict liability when intent was not required.

16. Article 5 made the important point that individual criminal responsibility was without prejudice to any responsibility under international law which a State might have for an act attributable to it. Developments in international law over the past 50 years would seem to point to various levels of responsibility for States and individuals: State responsibility for internationally wrongful acts; State responsibility for internationally wrongful acts which would constitute international crimes under article 19; individual

responsibility for international crimes under treaty law or general international law; and individual responsibility for international crimes which, under future treaty law or general international law, would constitute crimes against the peace and security of mankind. The interplay between State responsibility and individual responsibility was not necessarily clear. Where the individual was a government functionary acting on behalf of the State, it was quite likely that State responsibility would arise in addition to individual responsibility in respect of acts by the individual which constituted crimes against the peace and security of mankind.

17. General Assembly resolution 3314 (XIX) offered the best practicable approach to the definition of aggression in the Code. A national parliament or the Security Council would decide whether an act constituted aggression based on political considerations, whereas a judicial tribunal would arrive at a decision on a juridical basis. It was essential to bear that distinction in mind; in that regard his delegation reiterated its view that the establishment of an international criminal court was a necessary concomitant to the Code.

18. The words "as leader or organizer" in article 15, para (i) and in other parts of the Code should be deleted since the twin criteria of exceptional gravity and international concern would be sufficient to identify the kind of individuals capable of committing aggression. It favoured retention of paragraph 7. With regard to paragraph 6, his delegation considered that that safeguard clause would go a long way towards defining the scope of the crime and would allow due account to be taken of the two situations mentioned in paragraph 75 of the report concerning "the decline in the number of situations qualifying as internal affairs" and "the emergence of situations, affecting human rights in particular, in which the internal jurisdiction exception was unwarranted".

19. With regard to article 20, he urged the Committee not to accept the compromise suggested in the report of excluding apartheid from the Code and, instead, addressing situations of institutionalized racial discrimination as systematic violations of human rights. He supported the change in the title of article 21 and also agreed that the crimes should not be confined to an agent or representative of the State and that the provision should be reformulated so as to include acts committed by any individual, in which case the phrase "as an agent or a representative of the State or as an individual" could be deleted. The proposal to incorporate the twin concepts of exceptional gravity and international concern in article 1 would facilitate removal of the concept of "massive" violations. Furthermore, the article should also cover the practice of forced disappearance. It would be inappropriate to refer simply to "persecution" as a crime without setting the context in which an act of persecution became a crime against humanity. For that reason he would prefer a reference to "persecution on social, political, racial, religious or cultural grounds".

20. With regard to article 22, his delegation supported the use of the traditional terminology "war crimes". The idea of exceptional gravity and international concern would render unnecessary the use of the term "exceptionally serious war crimes", but his delegation would not object to its use. The reference to grave breaches of the Geneva Conventions of 1949 was not

sufficiently comprehensive because it did not cover Additional Protocol I and, more importantly, because it would not apply to States which were not parties to the Geneva Conventions of 1949 but which were none the less bound by the rules of customary international law applicable to armed conflict. For that reason, he was attracted to the suggestion made in the report that the term "international humanitarian law" should be used instead. The text could be formulated as follows: "grave breaches of [the Geneva Conventions of 1949 and Additional Protocol I] [the rules applicable in armed conflict set forth in international agreements] and the generally recognized principles and rules of international law which are applicable to armed conflict". In view of the principle nullum crimen sine lege, every effort should be made to ensure that the list of war crimes was exhaustive.

21. Jamaica supported the inclusion of the crime of international terrorism in article 24 of the Code, subject to the following comments. Firstly, the crime should be applicable to any individual, not merely to an agent or a representative of a State; accordingly, the words "as an agent or a representative of a State, or as an individual" should be deleted. Secondly, requiring the acts of violence to be "against another State" was an unnecessary restriction; it was enough that the acts should be directed at persons or property. Thirdly, it was unduly restrictive to require that the purpose of the act of terrorism was "to compel the aforesaid State to grant advantages or to act in a specific way"; accordingly, those words should be deleted. Fourthly, consideration should be given to the possibility of including in the article the saving provision in paragraph 7 of article 15 (on aggression) which preserved the right of peoples to struggle for self-determination and independence.

22. The inclusion in article 25 of illicit traffic in narcotic drugs was commendable. The criteria which his delegation had proposed for article 1 rendered it unnecessary to provide in article 25 that the traffic in drugs must be on a large scale or in a transboundary context. Paragraphs 2 and 3 were inspired by the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the article should therefore expressly provide for the requirement of intent in the commission of the crime. His delegation agreed with the view that illicit traffic in drugs, when massive in character, constituted a crime against humanity; it was nevertheless in favour of defining it as a separate crime. The words "contrary to internal or international law" in paragraph 2 of article 25 should be deleted because the basis for criminalizing the acts referred to in paragraphs 2 and 3 was the Code itself, and not necessarily internal or international law. If the Code was implemented by a treaty, then States parties would probably have an obligation to take the legislative measures necessary to criminalize the various crimes under domestic law. In such a situation, however, the criminalization of illicit traffic in drugs under domestic law would result from the Code itself and the treaty or other instrument in which it was embodied. The danger of the phrase "contrary to internal or international law" was that the provision would have no application if a State's domestic law failed to criminalize such traffic or if international conventional law or international customary law failed to proscribe it. It was therefore appropriate to omit the phrase, thereby making the Code itself the basis for the criminalization of the acts referred to in paragraph 2.

23. Lastly, his delegation supported the inclusion in article 24 of wilful and severe damage to the environment. The required scale of the damage in order to determine the existence of criminality would be guaranteed by the proposed requirement of exceptional gravity and international concern.

24. Mr. CHEN Shiqui (China), referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that the International Law Commission had broken a long stalemate by adopting general provisions and draft articles A to D. Draft article D, which set forth the principle that liability for significant transboundary harm caused by lawful activities gave rise to reparation, was a very important provision. There was already sufficient international practice and jurisprudence in that respect.

25. Two important issues remained to be resolved. The first was the scope of the draft articles, for which reference should be make to relevant provisions in recent conventions on transboundary harm. In addition to elaborating a general definition, it would be necessary to draw up a list of activities and materials capable of causing significant transboundary harm. His delegation agreed that consideration of the question should be entrusted to a working group and that a more detailed provision should be drafted once the formulation of the articles on liability and reparation had been completed.

26. The other question which needed to be resolved was the definition of harm. His delegation shared the Special Rapporteur's opinion that the term encompassed not only damage done to persons or property but also damage done to the environment.

27. With regard to treaty law and practice, he said that the Vienna Convention on the Law of Treaties contained relatively detailed provisions in that regard but that many gaps remained to be filled because of differing State practice with respect to that Convention and other instruments. The main problem was that a number of conventions prohibited reservations to all or some articles. Accordingly, some States made interpretative declarations regarding certain articles or treaties at the time of accession or ratification. In effect, such declarations amounted to reservations. The relationship between States expressing reservations and other States parties, including States parties expressing opposition to those reservations, and the legal effects of the convention as a whole on States expressing reservations needed to be clarified.

28. With regard to State succession and its impact on the nationality of natural and legal persons, he said that the question of nationality was primarily a domestic-law matter. However, other factors, pertaining to international law, must also be taken into account. In the event of a succession of States, the acquiring or loss of nationality should be properly resolved to avoid dual or multiple nationality and to alleviate or solve the problem of statelessness. With respect to methodology, China shared the view that the nationality of natural persons should be dealt with first and that of legal persons later.

29. Lastly, his delegation believed that, in considering the topics of reservations to treaties and State succession and its impact on the nationality

of natural and legal persons, the Commission should henceforward turn its full attention to substantive matters, which thus far had received only superficial treatment.

30. Mr. YENGEJEH (Islamic Republic of Iran), referring to the law and practice with respect to treaties, said that the question of reservations to treaties was an integral element of the contemporary international legal order. The right to make reservations and to become a party to multilateral treaties subject to such reservations derived from the right of sovereignty enjoyed by every State under international law. The main elements of the applicable regime were provided for in article 19, paragraphs (a) and (b), of the Vienna Convention on the Law of Treaties. That regime reconciled two fundamental requirements: the need to facilitate the ratification of or accession to multilateral treaties of general interest and the need to recognize the right of States to preserve their positions at the time of signing, ratifying or acceding to such treaties.

31. His delegation was in agreement with the conclusions of the Special Rapporteur and the Commission to the effect that the achievements of the Commission with respect to reservations should not be called into question, since the rules set forth in the Vienna Conventions on the Law of Treaties operated relatively well, irrespective of their possible ambiguities. The Commission's task should therefore be to fill the gaps and to clarify any ambiguities. With regard to the question of reservations to human rights treaties, he said that the Commission had rightly decided in 1966 to refuse to grant exceptional treatment (lex specialis) for reservations to certain kinds of treaties.

32. Mr. YAMADA (Japan), referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that the Commission had not yet determined the precise scope or the nature of the articles to be drafted or the eventual form of the outcome of its work. However, in 1992, the Commission had decided to approach the topic in stages and to proceed with the drafting of articles solely in respect of activities having a risk of causing transboundary harm. It had therefore assigned priority to preventive measures, although the core of the topic could not be anything other than liability.

33. With regard to the new draft articles, he pointed out that article A on freedom of action and the limits thereto was the basis for the entire topic. Article B established the obligation of States to act with due diligence by adopting appropriate measures to prevent or minimize the risk of significant transboundary harm. Application of these norms could be expected to run into difficulties. Consequently, and in order to make the clause more effective, the contents and degree of due diligence should be considered in conjunction with article 14. Article C on liability and reparation made no reference to the responsibility of States. Since it dealt with exceptionally hazardous activities such as nuclear energy activities, there were treaties that imposed strict liability on operators and States. However, the variety of categories of responsibility provided in the legal instruments on the question made it doubtful that State responsibility for hazardous activities was established as a general principle under international law. He hoped that the Commission would make progress on that aspect.

34. He agreed with the proposals of the Special Rapporteur and the Working Group that the issue of nationality of natural persons and that of legal persons should be separated and that the impact of State succession on natural persons should be studied first and on legal persons later. Moreover, his delegation found it a reasonable working hypothesis that, particularly in order to prevent statelessness, predecessor and successor States had an obligation to negotiate and to resolve through agreement problems of nationality arising from State succession. The Working Group classified the various types of State succession into three groups: cases of secession and transfer of part of a State's own territory where the predecessor State continued to exist; cases of unification, including absorption, where the predecessor State ceased to exist; and cases of dissolution where the predecessor State ceased to exist but more than one successor State had emerged. That classification could be used as a practical analytical tool for consideration of each category of the rights and obligations of predecessor and successor States regarding persons whose nationality would be influenced. However, for the success of the analysis, much depended on how precisely the persons to be influenced in each category could be identified.

35. With regard to the final outcome of the work on the question, he agreed with the Special Rapporteur's suggestion that the matter should be studied when the Commission's deliberations had reached a more advanced stage. Nevertheless, in view of the fact that treaty-making took considerable time and that neither the Vienna Convention on Succession of States in respect of Treaties nor the Vienna Convention on Succession of States in respect of State Property, Archives and Debts had come into force, he believed that a declaration setting forth general principles might be the most realistic course.

36. In connection with the future work of the Commission, the first question to arise was the application of the concept of a "genuine connection or link" which had hitherto been discussed in the general context of naturalization and had been applied taking into account various criteria such as national residence or habitual residence and place of birth. In the case of State succession, however, it was necessary to determine whether there should be some special feature in the application of that concept compared with its application in individual cases of naturalization. On the other hand nationality conferred on the holder certain fundamental political and civil rights. However, the question arose whether the holder had the right to refuse or renounce nationality, that is, whether the successor State had the obligation to recognize the existence of a group of people living in its territory who refused to accept the nationality of that State. He hoped that the Commission would look into those problems as well.

37. Turning to the law and practice relating to reservations to treaties, he noted that the rules set forth in the Vienna Convention on the Law of Treaties were being applied and innumerable State practices had already developed on the basis of those rules. Accordingly, in order not to create unnecessary confusion, those rules should not be revised. The Commission had decided not to change the rules but at the same time to compile detailed guidelines for practice in respect of reservations, thus adopting a balanced approach which would not only safeguard the present legal framework but also seek a solution of existing problems. His Government supported the questionnaire method of studying the problems arising in the practice and operation of reservations by

national Governments and international organizations. It also supported the proposal that the title of the topic should be changed to "Reservations to treaties".

38. Commenting on the other decisions and recommendations of the Commission, he said that the draft code on crimes against the peace and security of mankind and the draft convention on State responsibility would be reported out to the General Assembly in 1996, thus considerably lightening the Commission's agenda. Accordingly, the Japanese delegation proposed that it seek authorization to begin work on diplomatic protection and to initiate a feasibility study on the law of the environment that would clear up many aspects of environmental law and provide guidance for future work on the question of international liability.

39. Mr. PASTOR RIDRUEJO (Spain), commenting on the effect of State succession on legal persons, said that he supported the Special Rapporteur's suggestion that the Commission deal with the question separately from the question of the nationality of natural persons. There was no question that priority should be given to the problems of the nationality of natural persons who represented the essential component of the State, namely, its population and who consequently ran greater risks and raised more problems when State succession occurred. The problems created for legal persons were of another order and less important.

40. An important requirement for diplomatic protection warranting particular attention was continuity of the nationality of the person being protected. The problems that might arise from State succession in that respect had already been resolved. Diplomatic protection would not be admissible unless there was continuity of nationality to prevent abuse and a change of nationality resulting from State succession should not affect the exercise of diplomatic protection.

41. He agreed with the Special Rapporteur that it was important for the Commission to determine the specific limitations to which the predecessor State would be subject in depriving of their nationality the inhabitants of the territory it had lost. It should also determine what limitations were placed on the obligation of the successor State to grant its nationality to the inhabitants of the territory of which it had become sovereign as a result of the succession. The Commission should clarify those two basic problems. The item on State succession should not generate a convention; it should merely produce guidelines or some model clauses that could prove useful to States confronting nationality problems created by State succession.

42. With regard to the law and practice of treaties, he said that the issue of reservations hovered between two poles of attraction, namely, the integrity and the universality of treaties. The requirement of integrity (i.e. that the treaty should be the same for all parties) entailed a highly restrictive regime governing reservations. On the other hand, the requirement of universality (i.e. that the treaty should be acceptable to the greatest possible number of States) required a liberal and flexible regime governing reservations. Guided by the requirement of universality, the 1969 Vienna Convention adopted a generous and liberal regime for reservations.

43. Consequently, as the Special Rapporteur had proposed and the Commission had agreed, as a general rule, the Commission should retain the regime described in

articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties, as confirmed by the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations.

44. Spain firmly supported that regime since the necessary legal security that the matter demanded would otherwise be seriously threatened. The Commission should fill the gaps in the existing regime and clarify the following points: the effects of non-permissible reservations; the regime of objections to reservations; and both the precise difference between reservations and interpretative declarations and the exact definition of the legal effect of the latter. The Commission should not, however, concern itself with reservations to human rights treaties, which were no different from any other and should therefore be governed by the general principles of the law of treaties. It would be preferable if reservations were not made to such treaties, which should be binding on the greatest possible number of States. Such universality called for scrupulous respect for the norms accepted by States with regard to reservations to treaties. If international bodies and institutions specializing in the matter failed to respect either those norms or the effects of reservations, they would be altering the consensual basis of the law of treaties as a whole, thus doing no favours to the cause of human rights. The result would be that States would be unwilling to participate in treaties applied in a way that ran counter to their wishes.

45. As for the final form of the work on the topic, given that the regime of the 1969 Vienna Convention had to be respected, his delegation was in favour of adopting model clauses, in the knowledge that various sets of clauses would have to be drawn up to correspond to different types of treaties.

46. The title of the topic should be changed to "Reservations to treaties", as the Special Rapporteur suggested. As for its long-term programme of work, the Commission should deal with the topic of diplomatic protection, but it would not be desirable to start work on the legal protection of the environment, not even by means of a feasibility study. It was important that the work on international liability for injurious consequences arising out of acts not prohibited by international law should first be brought to a conclusion, since that work was bound up with the question of environmental protection.

47. Mr. SOULAMA (Burkina Faso) said he was concerned by the fact that over the previous decade the Commission's work had not resulted in legal instruments that were ready for signature despite the rapid changes and transformations world-wide that required certain minimum standards of behaviour.

48. Burkina Faso, which was fighting a constant battle against desertification, had an interest in the question of wilful and severe damage to the environment. He therefore considered that such damage should not have been excluded from the draft Code of Crimes against the Peace and Security of Mankind, since it had all the characteristics of such crimes, such as "seriousness", "massiveness" and "effects on the foundations of the international legal order". Its exclusion had been defended on the grounds that environmental law was not sufficiently developed. Those holding that view were keen to approve the draft statute for an international criminal court, while maintaining that there was no link

between the court and the draft Code of Crimes against the Peace and Security of Mankind. He believed, however, that certain kinds of environmental damage constituted a threat to the peace and security of mankind and that they should therefore be included in the Code. As a result, the Commission's move to set up a working group to examine damage to the environment in the context of the draft Code was to be welcomed. He hoped that the group's work would lead to the retention of article 26 of the draft.

49. He considered that in characterizing certain crimes included in the draft Code no reference should be made to provisions of the Charter of the United Nations that were also relevant. It could give rise to a conflict of competence between two United Nations organs.

50. Mr. LEGAL (France) said he regretted the tendency in the Sixth Committee to examine the report of the Commission without taking due account of the fact that its function was not to tackle technical questions, but to indicate policy directions. He suggested that the problem should be addressed later, for example, along the lines suggested by the representative of Austria.

51. Turning to the question of State succession and its impact on nationality, he said that, as the Special Rapporteur had pointed out, the identification of a State's nationals fell within the internal law of that State, including in the case of State succession, and the freedom of action of the State with regard to nationality was subject to very few restrictions. Although the report generally adhered closely to the tradition of international law, it was at times ambiguous when it differentiated between the reality of the law (lex lata) and what it should be (lex ferenda).

52. France was not opposed to the evolution of international law, but, like other States, it believed that the Commission should make as clear as possible a distinction between the codification of law and its progressive development. The limitations on the freedom of States to determine nationality were based essentially on conventions of great moderation and neither current positive law nor any universal multilateral convention established a general right to nationality. On the other hand, Article 24 of the International Covenant on Civil and Political Rights stated that "Every child has the right to acquire a nationality", while Article 15, paragraph 2, of the Universal Declaration of Human Rights stated that "No one shall be arbitrarily deprived of his nationality". In other words, there were no obvious solutions in that regard. One of the basic aims of the Commission should therefore be to examine the practice of States.

53. His delegation was aware that the question of reservations to treaties was a difficult one, since it involved preserving the basis of the traditional approach, namely the free consent of States, and its corollary, the right to make reservations, so that States would feel able to accede while simultaneously ensuring the unity of the relevant legal norms. At the same time, it was a matter of topical importance, since several international human rights bodies had recently adopted positions that made it essential to undertake an in-depth study of the specific question of reservations to human rights treaties. Moreover, as the Special Rapporteur indicated in his report, the issue raised important questions, such as whether the validity of a reservation depended on

its content or on the reaction of the other contracting States, whether the State had discretionary powers with regard to reservations and whether there was a difference between reservations and interpretative declarations.

54. The most important issue in that connection, however, was whether the system established under the Vienna Convention on the Law of Treaties was or was not satisfactory. Like the 1978 and 1986 Vienna Conventions, the Convention contained some gaps and differed from customary international law in several ways. It was for that reason that France had not signed or ratified those Conventions. In any case, their provisions on reservations worked well. His delegation therefore believed that the system established in 1969 should not be abandoned in order to accommodate the recent positions adopted by some international human rights bodies with regard to human rights treaties. Those positions moved too far from the generally accepted norms of international law and could make it difficult for some States to accede to those instruments. Moreover, it should be noted that treaties were governed by the law of treaties, and were based on the consent of States, and that States sometimes gave their consent only subject to reservations. The only possible effect of reservations was thus a declaration that their consent was not valid and that States which had formulated reservations could not be considered parties to the instruments concerned. There was nothing unlawful about reservations as such and any distinction between reservations to human rights treaties and those to other treaties lacked a legal basis. It was therefore unnecessary to establish special rules on reservations applying solely to human rights treaties.

55. Ms. ŠKRK (Slovenia) said that she fully agreed with the Special Rapporteur that the legal issues relating to nationality that might arise as a consequence of State succession belonged to internal law, private international law and comparative law on the one hand and to public international law on the other hand. The discretionary powers of States with respect to nationality derived from their sovereignty over territory and persons. The limitations imposed on those powers by international law should be used as a basis by the International Law Commission in the preparation of the preliminary study on State succession and its impact on the nationality of natural and legal persons. She further supported the Special Rapporteur's view that the Commission, in order to ensure uniformity of terminology, should abide by the common definitions and basic principles formulated in the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. It would be useful, however, if the Commission could clarify any differences that might exist between the terms "nationality" and "citizenship".

56. Her delegation was aware that the legal consequences of the recent dissolution of federal States of Eastern Europe had led the General Assembly to endorse the Commission's intention to work on State succession and its impact on nationality. Should the Commission decide to devote its future work to the most obvious legal and practical problems related to the nationality of persons, in particular statelessness, the most suitable instrument for that purpose would be the 1961 Convention on the Reduction of Statelessness. Her delegation did not contest the Commission's conclusion that State succession and its impact on the nationality of natural persons might affect certain basic human rights of individuals, especially those relating to nationality. At the same time, one

must not forget that the nationality of legal persons, which was subject to domestic law, might, in cases of State succession, entail legal consequences that affected not only the legal status of persons but also the property rights of natural persons. In that regard, the Commission should be guided by the general principle that succession must not prejudge any question relating to the rights and obligations of natural or legal persons in accordance with article 6 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

57. Should it decide to elaborate a non-binding instrument to govern State succession and its impact on nationality, the Commission ought to follow the United Nations Commission on International Trade Law (UNCITRAL) approach of establishing model rules or guidelines. It did not favour a draft declaration on State succession and its impact on nationality that contained standards stricter than the provisions already in force and confirmed by State practice or exceeded the scope of the related basic human rights norms and treaty obligations. Such a declaration would give the false impression that it concerned only those States that were directly affected by State succession and would be incompatible with the principle of the sovereign equality of States.

58. A study should be made of the concept of the genuine link, taking into account State practice and the relationship between the application of that concept and respect for the principle of non-discrimination. The Commission should also examine thoroughly the problem of dual nationality in cases of State succession and study means for preventing the side effects of dual nationality. In case of doubt, the genuine link principle should prevail. One means whereby individuals could change nationality under special circumstances was the right of option. That right was not an attribute of self-determination, which was in principle a collective human right. Consequently, in cases of State succession, States did not have an obligation to grant the right of option to individuals. As the Working Group on State Succession and its Impact on the Nationality of Natural and Legal Persons had pointed out, the right of option did not give an individual legal ground for acquiring dual nationality, but rather allowed him to opt between two nationalities.

59. Finally, she considered that the question of the continuity of nationality was closely related to the regime of diplomatic protection and supported the proposal by the United States of America to treat the question in the context of the Commission's work on diplomatic protection.

60. Mr. ECONOMIDES (Greece) said that the question of State succession and the nationality of natural and legal persons was difficult, important and topical. The first objective to be achieved in State succession was to ensure that every person had a nationality. To that end a successor State should have the ability to grant its nationality to all citizens of the predecessor State who lived or had their permanent residence in the territory to which the succession related. That obligation should be adapted to State practice, which constituted a fundamental element for the study of the topic, and to the norms of international law.

61. The change in nationality was automatic and ordinarily took place through the transfer of sovereignty to the successor State. Furthermore, it would be

advisable for the successor State to grant its nationality, on an individual basis, to persons requesting it who fell into the following categories: (a) persons born in the territory to which the succession related who had the nationality of the successor State and who, at the time of succession, lived or were resident outside that territory and (b) permanent residents or inhabitants of the territory to which the succession related who, at the time of succession, were nationals of a third State. The second major objective to be achieved was to prevent State succession, in so far as possible, from giving rise to cases of statelessness. For that purpose, a successor State should grant its nationality to the following persons: (a) permanent residents or inhabitants of the territory to which the succession related who, at the time of succession, were or became stateless, and (b) persons born in the territory to which the succession related who lived or were resident outside that territory and, at the time of succession, were or became stateless.

62. Another question that must be solved related to the right of option and consisted in determining whether and to what extent, in the case of State succession, the individual will of the inhabitants of the territory concerned should be taken into account. According to Greek practice, the successor State must in such cases grant the right to choose the nationality of the predecessor State, but solely to persons having ethnic, linguistic or religious ties to that State.

63. Also to be resolved was the question of the nationality of legal persons. Inasmuch as State practice in that regard was fairly limited, the best approach would be to take the norms applicable to natural persons as a basis and, accordingly, to provide that legal persons domiciled in the territory to which the succession related should automatically acquire the nationality of the successor State as from the time of succession. It went without saying that all such norms and suggestions would apply solely to cases of succession considered lawful under international law. That was also what had been established by the 1978 and 1983 Vienna Conventions on succession of States.

64. Regarding reservations to treaties, his delegation shared the view that the issue must be handled with the utmost care and believed that the existing gaps in the law of treaties, especially with regard to so-called "delayed reservations", should first be filled.

The meeting rose at 1 p.m.

UNITED NATIONS

General Assembly

FIFTIETH SESSION

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SIXTH COMMITTEE
23rd meeting
held on
Friday, 27 October
at 10 a.m.
New York

SUMMARY RECORD OF THE 23rd MEETING

Chairman: Mr. LEHMAN (Denmark)

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The meeting was called to order at 10.10 a.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10, A/50/402)

1. Mr. RASHID (Malaysia), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that his delegation supported, in principle, the decision to submit four of the six crimes to the Drafting Committee for consideration. Aggression, genocide, systematic or mass violation of human rights and exceptionally serious war crimes were indeed exceptionally serious crimes of international concern. Although it was difficult to define aggression precisely, draft article 15 could serve as a basis for further elaboration of the term. His delegation could not, however, subscribe to the view that it was incorrect to say that any use of force against the territorial integrity or political independence of any State could be equated with aggression.

2. With respect to the systematic or mass violation of human rights, he felt that that crime should be limited to the most serious abuses, such as torture and forced disappearances. On the other hand, imposition of the death penalty or of preventive detention measures enacted by the legislation of a democratic State should not be regarded as coming within the ambit of that crime. As regarded genocide, his delegation supported the definition found in the International Convention on the Prevention and Punishment of the Crime of Genocide.

3. International terrorism and illicit traffic in narcotic drugs fell short of the requisite criteria to be considered crimes against the peace and security of mankind; moreover, they were sufficiently dealt with in other conventions. Malaysia recognized the seriousness and the deleterious social and economic effects of illicit trafficking in narcotic drugs and had accordingly enacted penal legislation and preventive measures to combat it. However, it hoped that enhanced bilateral and multilateral cooperation would make it possible to address specific issues relating to those matters.

4. He felt that, in order to be considered a crime, wilful and severe damage to the environment would have to be of such magnitude as to threaten the peace and security of mankind present and future. Such damage could be the result of the deliberate detonation of nuclear devices and transboundary pollution. His delegation doubted the future capacity of the nuclear Powers to defuse, and destroy those devices. For that reason, improper disposal of massive quantities of nuclear material and devices could cause an environmental disaster of frightening proportions.

5. With regard to State responsibility, the procedure proposed in article 19 of Part One of the draft, by involving the General Assembly, the Security Council and the International Court of Justice, caused problems that needed to be satisfactorily addressed. In addition, the core issue of crime versus delict had not been successfully addressed vis-à-vis States. Individuals of a State could commit crimes for which they could be convicted and punished by the relevant law enforcement agency of that State. To attempt to analogize by

substituting the State for the individual would demand an in-depth study of the question of whether States could commit crimes.

6. With respect to articles 13 and 14 of Part Two, his delegation agreed that proportionality was the principal requirement to legitimize the taking of countermeasures and as such its inclusion was vital. Although the principle underlying article 14 was acceptable, paragraphs (d) and (e) required further work as in their present form they offered the possibility of subjective construction. In any case, Part Two should be examined as a separate entity in due course.

7. The mechanisms proposed in Part Three offered a tiered system for dispute settlement commencing with negotiation and culminating with the Court. His delegation regarded them as non-controversial.

8. With respect to international liability for injurious consequences arising out of acts not prohibited by international law, he noted the progress achieved through the adoption of 18 draft articles. The principle embodied in draft Article A was an important one, inspired by Principle 21 of the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development.

9. Malaysia considered that oil spills were among the activities that could result in transboundary harm, while transboundary flooding as a result of the clearing of forests did not come within the scope of that draft article. His delegation saw the need for Articles B and D on prevention and cooperation respectively in the context of transboundary harm. On the other hand, Article C on liability and reparation constituted a statement of principle which needed to be elaborated on.

10. Ms. CHOKRON (Israel), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that her delegation had not forgotten that the atrocities committed during the Second World War, especially against her people, had led the Assembly, in 1947, to ask the Commission to consider a draft code on the subject. She was aware that the preparation of the draft had encountered obstacles and that the differences of view on the subject in the Sixth Committee seemed insurmountable. Nevertheless, the Special Rapporteur's proposal to limit the number of crimes to six seemed to have received the support of many members of the Committee.

11. Agreement had been reached on retaining the crimes against conscience, morality and the fundamental interests of the international community, crimes which were exceptionally serious and therefore threatened the peace and security of mankind. Agreement had also been reached on the need to define the crimes concisely and precisely, as was appropriate in criminal law. There seemed to be convergence on the intellectual and abstract level but, when it came to specifics, differences arose regarding the crimes to be retained and their definition. With regard to the definition of the crimes, it was important to emphasize those aspects which made it possible to attribute a crime to an individual, including one acting on behalf of a State. That element was not included in the definition of aggression proposed by the Special Rapporteur. The concept of State crime was discussed both in the context of the draft Code

of Crimes and in that of State responsibility, but that did not correspond either to the reality of international relations or to the international law established by the International Convention on the Prevention and Punishment of the Crime of Genocide. For that reason, it should be emphasized that only individuals could be brought to trial.

12. Although the new title "Crimes against humanity" proposed by the Special Rapporteur was more appropriate, it should be specified that the concept covered only crimes committed in a situation of armed conflict and deliberately directed against a civilian population. The Commission should consider only the most serious war crimes. In that connection, she recalled her delegation's reservations to Additional Protocol I to the 1949 Geneva Conventions.

13. The theme of State responsibility was basic to maintaining harmonious international relations. The Commission's report asked members of the Committee for their opinion on two basic questions: the legal consequences of internationally wrongful acts termed crimes in article 19 of Part One of the draft and how to resolve the disputes relating to the legal consequences of an international crime. Israel had repeatedly expressed its reservations with respect to the concept of State crime introduced in article 19. It would therefore refrain from commenting on a proposal it could not accept. In that connection, she proposed that the concept of State crime and the distinction between crimes and delicts in the context of responsibility should be reviewed, as well as the usefulness of the concept itself in view of its practical consequences.

14. Turning to the settlement of disputes relating to the legal consequences of an international crime, she said that the idea of compulsory arbitration or compulsory conciliation could be useful. Under article 5, paragraph 2, however, the State against which countermeasures had been taken was entitled unilaterally to submit the dispute to an arbitral tribunal. Yet it was precisely that State which had violated the international obligation in the first place, thereby leading the other State or States to take countermeasures. It was not clear, in that case, how justice would be achieved or how the principle of the sovereign equality of States would be strengthened.

15. On the issue of the law and practice relating to treaties, she stressed the need to determine whether or not a special regime for human rights treaties was necessary. Although the issue of reservations to treaties was not new, no proposal submitted on that issue had had sufficient support to permit the adoption, in the area of the law of treaties, of a clear and comprehensive regime. The inclusion of the issue in the Commission's programme of work was another attempt to achieve that goal. The establishment of a special regime relating to human rights, or in another area, would only exacerbate current disputes and pointlessly hold up consideration of the issue.

16. Mr. AYEWAH (Nigeria), turning to the draft Code of Crimes against the Peace and Security of Mankind, said that his delegation could accept in principle the suggestion by the Special Rapporteur to limit the list of crimes, so long as that would promote consensus and facilitate acceptance of the Code by the international community. All the same, he would prefer it if all the articles adopted by the Commission on the first reading were considered, since a

comprehensive Code would be more effective for the strengthening of international law. His delegation welcomed the proposal to replace the title of article 21 with "Crimes against humanity", and favoured the inclusion in the Code of institutionalized racial discrimination and the recruitment of mercenaries. In addition, he reiterated his delegation's view that the draft Code of Crimes should be linked with the draft Statute for an International Criminal Court.

17. On the topic of State responsibility, the question of the legal consequences of internationally wrongful acts characterized as crimes under article 19 of Part One of the draft articles raised legal issues and politically sensitive matters which would have to be addressed. He was aware that many Governments would be reluctant to accept the concept of "State crimes" and that the criminalization of States might result in the punishment of an entire people. Nevertheless, he shared the view of the Special Rapporteur that the Commission should endeavour to strike a fair balance between the ideal and what was possible. The institutional mechanism provided for in article 19 was an interesting proposal, which, if approved, could forestall the possibility of an arbitrary action. Instead of the two-phased procedure referred to in that article, however, his delegation preferred the proposal whereby the General Assembly or the Security Council would appoint an independent commission of jurists or, better still, the International Court of Justice would appoint an ad hoc chamber to exercise those functions. His delegation supported the inclusion in the draft of a compulsory dispute settlement procedure and believed that it could be useful in protecting weak States from possible abuse on the part of powerful States, particularly with regard to the right to take countermeasures.

18. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he stressed the need to identify the dangerous activities falling within the scope of the topic and welcomed the establishment of a working group to study that aspect, focusing on issues of prevention related to activities creating a risk of causing transboundary harm. In principle, his delegation agreed with the draft articles adopted thus far by the Commission but believed that human beings should not be entirely excluded from consideration in an instrument on liability for environmental damage. Thus, he hoped that the wording of article A would be improved; it would be more appropriate, in the first part, to state the principle in a positive form.

19. On the question of State succession and its impact on the nationality of natural and legal persons, he supported the view that future reports of the Special Rapporteur should reflect recent State practice and believed that consideration should be given first to the nationality of natural persons and then that of legal persons, and that the common principles applicable to both should be determined. In determining the parameters of the topic, care should be taken not to over-emphasize the role of international law, bearing in mind the general recognition of the exclusive character of the competence of the State in determining which individuals were its nationals. As for the nature of the instrument, he believed that a declaration would suffice.

20. Finally, on the question of the law and practice relating to reservations to treaties, his delegation believed that the entitlement to make reservations

and to become party to a convention subject to such reservations was a sovereign right enjoyed by every State under international law.

21. Mr. STRAUSS (Canada), turning to the draft Code of Crimes against the Peace and Security of Mankind, said that he was pleased that the Commission had reduced the Code's scope to four crimes, and was continuing consultations on two others. Some of the crimes included in the draft, however, were already covered by other multilateral conventions and they were all included in the draft Statute for an International Criminal Court. The Commission should concentrate its efforts on those initiatives with the greatest chance of success, notably, the draft Statute for an International Criminal Court, where a widely accepted goal and efficient working methods had combined to produce excellent results. At the same time, care must be taken to avoid inconsistencies between the draft Statute and the draft Code of Crimes.

22. Where the issue of State responsibility was concerned, his delegation shared the reservations expressed by previous speakers on article 19 and on the question whether States could commit crimes. He suggested that the Commission should perhaps focus on areas where it was easier to reach general agreement.

23. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, the Commission itself drew attention to the difficulty of finding a universally accepted concept of environment, a problem which was certain to affect efforts to define the scope of any future instruments on that topic. The law of the environment involved many political and economic issues and his delegation felt that a more coordinated approach to the problem would produce more substantive results.

24. With regard to the issue of State succession and its impact on the nationality of natural and legal persons, he welcomed the progress made by the Commission during its latest session and he also commended it on the approach it had taken to the issue of the law and practice relating to reservations to treaties.

25. Finally, turning to the programme of work of the Commission, his delegation shared the concerns stated by other delegations. The excessive time spent by the Commission on certain issues was due, first and foremost, to the lack of consensus on fundamental issues related to them. His delegation therefore urged the Commission to review its practices with a view to speeding up its work. He also suggested that the resolution to be adopted by the General Assembly during its current session should note the concerns expressed during the Committee's debate.

26. Mr. HAFNER (Austria) said that there was an urgent need to regulate the matter of State succession and its impact on the nationality of natural and legal persons owing to the inadequacy of existing international regulations. Moreover, the question of nationality was of vital importance to individuals inasmuch as it determined their access to certain instruments that guaranteed their rights.

27. As recent experience had shown, States affected by a case of State succession did not resolve questions of nationality through treaties or

agreements. International regulation of the issue was therefore required. The Working Group had been right to stress, at the start of its deliberations, the duty of the States concerned to consult among themselves to solve the problems stemming from territorial changes.

28. He agreed with the Special Rapporteur's basic assumption that nationality could be granted only under internal law and not under international law. He also agreed that international law placed limitations on the right of States to grant their nationality, although opinions still differed on the question of recognition by third States. Some aspects of the rules on nationality undoubtedly fell within the province of human rights, whether or not article 15 of the Universal Declaration of Human Rights, according to which everyone had the right to a nationality, was viewed as a norm of general customary law. Moreover, the 1961 Convention on the Reduction of Statelessness created an obligation for States to grant their nationality. Article 10 of that Convention could therefore be viewed as complementary to article 15 of the Universal Declaration of Human Rights.

29. That provision therefore supported the view that the protection of the individual against any detrimental effects resulting from a territorial change should always constitute the ultimate goal of the Sixth Committee when it explored existing rules or formulated new rules on nationality. The International Law Commission should scrutinize the effect of different types of territorial changes on nationality. For practical reasons, it should start from the different categories of State succession which were identified in the two Vienna Conventions of 1978 and 1983. However, such a method should not exclude the possibility of reviewing that categorization in the light of recent practice. In particular, the question of the extent to which the rights and duties of the new State and the predecessor State differed from the usual rules on naturalization and denaturalization should be examined. The question of whether the legal regime applicable to a partial succession differed from that of a universal regime should also be explored.

30. He did not agree with the Special Rapporteur's view that possession of the nationality of the predecessor State should be determined by whether individuals had been born in the territory affected by the change of sovereignty. The real question was whether, at the time when the succession had occurred, an individual had possessed the nationality of the predecessor State, through the principle of jus soli or jus sanguinis or through any other means recognized by international law. The second criterion to be taken into account was whether or not the individual was resident in the territory of the successor State.

31. The basic question was whether the successor State had any obligation to grant its nationality to persons residing in its territory and possessing the nationality of the predecessor State. An affirmative reply was usual in such cases inasmuch as every State needed a population; it could be deduced therefrom that any entity claiming to be a State was obliged to grant its nationality. That did not mean, however, that such an obligation could be imposed on a State by international law in the absence of any relevant domestic law. Existing legal instruments should be used to establish which categories of persons acquired nationality ex lege and which categories were entitled to acquire

nationality on a privileged basis, in other words, by exercising an option to that end.

32. At all events, those basic questions should not divert attention from the no less difficult issues ensuing from State succession, such as the reduction of statelessness, dual nationality and diplomatic protection where the principle of the continuity of nationality was difficult to apply in the case of a new State.

33. The problem of State succession therefore continued to require a great deal of work, in particular the collection and examination of the laws and other practices of States. The first step should be the preparation of guidelines which, despite their lack of legal status stricto sensu, could create more certainty in international relations since States that conformed to them would enjoy fumus juris and third States would find it difficult to deny recognition of nationality granted under such guidelines.

34. The preliminary conclusions of the Working Group should be checked against the actual practice of States so that rules de lege lata could be clearly distinguished from rules de lege ferenda. However desirable an obligation to negotiate might be, contemporary international law did not seem to impose any such obligation on the successor State; moreover, it could not be deduced from the general obligation to negotiate in the case of a conflict. Furthermore, using the fact of a person's birth in the territory of the successor State as a criterion for the obligation to grant nationality was questionable. Questions relating to the reduction of statelessness were apparently being confused with questions relating to State succession. Why, for instance, should a person who had been stateless under the regime of the predecessor State and who resided in the territory of the successor State acquire the nationality of the latter merely as a consequence of State succession? In such a case, the rules governing the reduction of statelessness should apply irrespective of State succession.

35. Questions related to the nationality of juridical persons should not be addressed in the same context as statelessness for the following reasons: the nationality of juridical persons did not constitute such a persuasive factor for statehood as that of natural persons and was not intrinsically connected with the sovereignty of States; conventions on the reduction of statelessness and on nationality usually referred to natural persons; juridical persons could not be treated on the same footing as natural persons, since it would be difficult to deduce, from general international law, a duty to grant nationality to certain juridical persons; lastly, the regime of juridical persons in cases of State succession depended mainly on the continued application of the civil law of the predecessor State. In the light of the existing difficulties regarding the nationality of natural persons, it would therefore be advisable to defer consideration of the matter for the time being and to concentrate on questions requiring immediate attention.

36. With regard to chapter VI of the report of the International Law Commission, reservations to treaties were one of the most complex areas of international law. The rules of treaty law therefore needed to be clarified in the light of the current practice of States. In recent years, the problem of reservations had been particularly acute in the area of human rights treaties.

Many reservations entered to those instruments were incompatible with the purpose of the treaties and were therefore inadmissible. The legal effects of inadmissible reservations and how they were to be addressed had become matters of concern for the legal advisers of many States.

37. In that connection, a meeting of legal advisers from the Ministries of Foreign Affairs of six European countries had been held in Vienna in June 1995 to exchange views and discuss options with regard to recent reservations entered by States acceding to or ratifying human rights instruments. The first report of the Special Rapporteur provided ample proof of the complexity of the issue and set out the many questions to which the reservation regime in the Vienna Convention on the Law of Treaties had failed to provide satisfactory solutions. Subsequently, the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations had merely adopted the regime on reservations contained in the Vienna Convention on the Law of Treaties.

38. Human rights treaties should incorporate clauses that regulated permissible reservations in order to preclude such problems as the one raised by Iran, which, upon its accession to the Convention on the Rights of the Child, had reserved the right not to apply any provision of the Convention that was incompatible with Islamic law. With regard to that reservation, Austria had stated that it could not make a final assessment as to its admissibility without further clarification from Iran. Consequently, until such time as it received that clarification, Austria considered that the reservation did not affect any provision whose implementation was essential to the fulfilment of the object of the Convention on the Rights of the Child.

39. Reviewing chapter VII of the Commission's report, his delegation took note of the Commission's endorsement of the Working Group's recommendation that a feasibility study should be undertaken on a topic concerning the law of the environment. In so doing, the Commission recognized the need for an integrated approach to prevent the continuing deterioration of the global environment. The study would encompass the following topics: general principles, substantive and procedural rules, measures for the implementation of obligations for the protection of the global environment, duties erga omnes, "global commons" and shared (or transboundary) resources. Over the previous decades, the international community had followed a sectoral approach in regulating environmental situations through a series of international agreements. The feasibility study, however, would depart from that traditional approach. In preparing the study, close cooperation should be established with international institutions concerned with environmental law, in order to avoid duplication of work. Furthermore, the study could build on the experience gained by the group of legal experts in environmental law of the World Commission on Environment and Development and the International Covenant on Environment and Development. The study would provide an overall picture of the state of international environmental law and would help to identify general principles which could then be further elaborated.

40. Mr. SMEJKAL (Czech Republic) said that the topic of State succession and its impact on the nationality of natural and legal persons was a complex problem

the analysis of which must take into account a situation in which territorial changes were affecting the nationality of millions of persons. As a contribution to the Commission's work, his delegation had made available legislative texts dealing with the succession by the Czech Republic to the former Czechoslovakia.

41. The norms applicable to the nationality of legal persons should be different from those applicable to the nationality of natural persons because, inter alia, human rights legislation was not applicable to legal persons. Consequently, priority should be given to the consideration of the nationality of natural persons.

42. Even though the consideration of the impact of State succession on nationality had raised many questions, it had confirmed the general principle that nationality was governed principally by domestic law and that international law had a subsidiary application in that area. The function of international law in that area was limited and corrective, in part because its content was rudimentary and limited to a few fundamental principles. The first requirement was that there should be a genuine link in order to avoid positive conflicts. As for negative conflicts, it seemed that international law tended to impose on States the duty to refrain from applying discriminatory criteria in the granting or revoking of nationality and the duty to ensure that State succession did not give rise to the creation of stateless persons. Because of that obligation, predecessor and successor States were required to consult and negotiate with each other with a view to preventing the creation of stateless persons.

43. The Commission had been considering that topic with great sensitivity and realism. For example, with regard to the manner in which a State should fulfil its duty to prevent the creation of stateless persons, the Commission had opted for a flexible solution which offered States a great variety of means to preserve the above-mentioned principles. In addition, the arrangement proposed in that regard was intended to serve as guidelines for States, which, however, would be under no obligation to apply them.

44. It would be helpful to further refine the terminology used in the report, which could give rise to misinterpretations. Nevertheless, his delegation had no difficulty in subscribing to the Working Group's preliminary conclusions, which were consistent with the practice followed in the matter at the time of the dissolution of Czechoslovakia. That experience showed that, in the case of a federal predecessor State, the application of the criteria of the nationality of federal States could be an option that recommended itself naturally on account of its simplicity, convenience and reliability. In general, that was reflected in the Working Group's report, although in paragraphs 11 (c), 12 (a), 14 (d), 19 (c) and 21 (a) the word "and" should be replaced by the words "or, in the case of a federal predecessor State composed of federated entities which conferred a secondary nationality,".

45. The Commission should give more careful consideration to the consequences of the failure to observe the principles which governed the granting and revoking of nationality, with a view to determining whether they could be invoked by persons or whether the debate should be concerned only with State responsibility. However that might be, given the nature of the topic, his

delegation was of the view that the results of the Commission's work thereon should take the form of a document that was declarative in nature. With regard to the continuity of nationality, he agreed with the Working Group's conclusions expressed in paragraphs 31 and 32 of its report. However, since the Commission had decided to take up the topic of diplomatic protection, it should continue to consider the question of the continuity of nationality in the context of that topic, since, in the event of State succession, the question would arise first with respect to the exercise of diplomatic protection.

46. On the question of reservations to treaties, his delegation agreed on the need to preserve the gains achieved in the Vienna Conventions of 1969, 1978 and 1986. Consequently, the Commission should take up the topic and determine the form which the results of its work thereon should take, given the need to maintain the flexibility of the current system. In that regard, his delegation welcomed the Special Rapporteur's proposal that a guide to past practice in the matter of reservations should be prepared. As for recent signs of the emergence of a more restrictive regime governing reservations to international human rights instruments, he considered that there was no justification for applying different regimes to the consent of States in depending on the particular field regulated by the treaty in question. That differentiation could weaken a well-established legal norm. The law of treaties governed all international agreements and autonomous will continued to be their cornerstone.

47. Finally, a broad approach must be followed in reviewing the Commission's work and due regard paid to the current situation in the area of codification. In particular, it must be borne in mind that the Commission was not the only body that participated in the standard-setting work of the United Nations, nor the only one affected by the current impasse in that task. The crisis in the area of codification and progressive development of international law was the result of many factors, including the exhaustion of the established topics for codification, and could therefore not be attributed only to the Commission's methods of work. Moreover, the Commission had demonstrated that it was capable of applying innovative methods of work, as shown by its increasingly frequent use of working groups and its capacity for innovation in terms of the forms which the final results of its work could take.

48. Mr. ENAYAT (Islamic Republic of Iran) said that the impact of State succession on nationality was one of the most important questions which had been left aside after the 1978 and 1983 Vienna Conventions. Given the human dimensions of the topic, codification was urgently required in that area. The report of the Working Group was a good starting point for further work on that topic. However, it would have been better for the Working Group to focus on the study of positive international law, applicable national legislation and State practice and then proceed to the formulation of recommendations to deal with those issues. His delegation was in favour of adopting a flexible method of work.

49. Turning to the section of the Working Group's report on the obligation to negotiate and to resolve problems by agreement, he noted that States were obligated by treaties and judicial decisions to enter into negotiations. For instance, Article 33, paragraph 1, of the Charter of the United Nations provided that "the parties to any dispute, the continuance of which is likely to endanger

the maintenance of international peace and security, shall, first of all, seek a solution by negotiation". The obligation to negotiate did not mean that States were under any legal obligation to reach agreement; nor did such obligation necessarily involve an obligation to pursue lengthy negotiations if the circumstances showed that they would be superfluous. The obligation of negotiation in that field might be envisaged in application of a treaty but not as an obligation under general international law.

50. Moreover, his delegation agreed that nationality was essentially governed by domestic law and that international law imposed some restrictions on the freedom of action of States in that regard: namely, those stemming from the principle of effective nationality and the protection of human rights and the duty not to pass arbitrary laws.

51. As far as the right of option was concerned, his delegation agreed with the International Law Commission that the individual's will did not have to be taken into consideration in relation to all categories of persons whose nationalities were affected by State succession but only in relation to the categories of persons mentioned in paragraphs 14 and 21 of the Working Group's report. In that regard, a distinction should be made between the case of secession and transfer of part of a State's territory and the case of dissolution of a State. In the latter case, it would be necessary to provide some criteria like the rules of linkage, since the principle of effective nationality should be taken into consideration for the exercise of the right of option. Such criteria were all the more necessary as the right of option did not reflect the codification of existing law but pertained to the progressive development of international law.

52. Ms. FLORES (Mexico) said that the complexity of the topic of international liability for injurious consequences arising out of acts not prohibited by international law accounted for the cautious approach adopted to the drafting of a legal regime in that field. Her delegation supported draft articles A, B, C and D and felt that their adoption by the Commission, albeit on a provisional basis, represented a major step forward in the consideration of the topic. Her delegation also welcomed the Special Rapporteur's proposal to include in the draft the concept of harm to the environment.

53. According to the approach adopted by the Commission, there were two aspects to the analysis of liability for acts not prohibited by international law: prevention and reparation. In both cases, the concept of harm played a fundamental role. Harm was the prerequisite on which State liability should be based; without the existence of harm, it would be contradictory to talk about an obligation to make reparation. The obligations of States with respect to prevention, as listed in articles 11 to 20 of the draft, formed part of international law. However, it was not clear what the consequences of their non-fulfilment were. In order for obligations with respect to prevention to actually lead to reduced risks, their non-fulfilment should entail certain consequences. The Commission should consider that topic in greater depth. She supported the Special Rapporteur's proposal to consider civil liability together with State liability.

54. Concerning the law and practice relating to reservations to treaties, the document considered the current situation relating to reservations under international law in an objective and comprehensive manner. She agreed with the Commission that, despite their ambiguities, the rules on reservations set forth in the Vienna Convention on the Law of Treaties had proved their worth and that future work on that topic should seek to determine how to complement the existing system and, where possible, to fill any gaps. Moreover, a comprehensive approach should be adopted to the issue of reservations. They should be accepted as valid only when they did not frustrate the purpose of the treaty to which they related. In that regard, opposability could be accepted only in the case of reservations that were not related to essential aspects of a treaty.

55. As to the form which the outcome of the Commission's work on that topic might take, in view of the problem of reservations and the need to have a uniform regime, it would be preferable to draft a binding instrument. However, for the time being, the Commission should work on draft articles without prejudging their final form.

56. Finally, the consideration of the topic relating to the protection and inviolability of diplomatic and other persons entitled to special protection under international law as well as the carrying out of a feasibility study on the rights and obligations of States concerning the protection of the environment would be extremely useful.

57. Mr. HALFF (Netherlands) welcomed the fact that the Commission had begun its work with the topic concerning reservations. Since problems with respect to reservations were not restricted to the field of human rights, the Commission's work should encompass reservations to a wide variety of treaties.

58. He agreed with the Commission that the issue of State succession with respect to reservations did not need to have a high priority. Existing written rules provided a clear answer not only in the case of newly independent States but also in other cases of State succession. Thus, written law might appear to be more restrictive than customary law.

59. There was an urgent need to clarify many of the legal questions raised by the Special Rapporteur in his preliminary report. In so doing it would be necessary to find solutions suitable for contemporary treaty practice.

60. With regard to the future work of the Commission on the law of the environment, his delegation had taken note of the endorsement by the Commission of the recommendation of the Working Group to begin a feasibility study on a topic concerning the law of the environment. The Netherlands had always taken a keen interest in the codification and progressive development of such a law and had actively participated in the development of various international agreements and declarations in that regard.

61. International environmental law had developed enormously mainly through the conclusion of a great number of international agreements dealing with the conservation and protection of oceans, seas, rivers, the atmosphere, the ozone layer, climate, biological diversity and cultural and natural heritage, or with

the relationship between the protection of the environment and other matters such as trade, development and armed conflict. In addition to the conservation and protection of such resources, other issues such as the liability for harm caused to the environment had become the subject of agreements and negotiations. The Commission itself had dealt with and continued to deal with the codification and progressive development of certain aspects of the law of the environment. Reference might be made in that regard to the concept of State crime in article 19 of Part One of the draft articles on State responsibility as well as the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. Environmental agreements had mostly been concluded on a sectoral basis. Many had been concluded on a regional or subregional basis. More recent conventions tended to be of a global nature and dealt with problems relating to the ozone layer, desertification, climate or biodiversity.

62. The time had come to scrutinize the fragmentary corpus of international environmental law and to develop common concepts and general principles which would provide the foundation for the future development of international environmental law. In such work, consideration should be given not only to the substantive rules of environmental law but also to the law on cooperation, the settlement of disputes and liability.

63. His delegation would support the development by the Commission of a set of draft articles laying down common concepts and general principles of international environmental law, provided that that task was achieved within a reasonable period of time. In that connection, an integral approach should be adopted which addressed the environment as a whole, namely, not only shared natural resources or the global commons, but also the environment within the territory of a State. Otherwise, it would be impossible to tackle in an adequate way developments within State boundaries which might be of great international significance.

64. Mr. SIDI ABED (Algeria), speaking on State succession and its impact on the nationality of natural and legal persons, said that nationality was closely linked to domestic law, not only by laws and regulations, but also by constitutions and jurisprudence. However, international law interfered with domestic law and State sovereignty, especially in such special circumstances as State succession and change of nationality. In that area, which was in fact quite narrow, the Commission should undertake, through a careful and thorough study, the difficult task of identifying the limits of States' discretionary prerogatives with respect to the granting of nationality.

65. With regard to the law and practice relating to reservations to treaties, his delegation was aware of the importance and technical nature of what was a complicated issue, for which there were, however, well-established principles and standards. If the Commission must fill in the gaps and clarify the ambiguities in existing texts, it should do so with great care and diligence. The legal framework was established in the Vienna Conventions of 1968, 1978 and 1986, whose effectiveness had been proved despite the imperfections inherent in any normative exercise. Finally, the Commission should take account in its work of the uniformity of the applicable norms in order to avoid getting bogged down in an excessively detailed discussion that could result in the establishment of

disparate regimes or could cast doubt on principles already established in the law of treaties and in respect of reservations.

66. Mr. POLITI (Italy), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that the prospects for the completion of the Commission's work on the draft Code during the coming year had been enhanced by the decision to limit the number of crimes included in that text. That approach would greatly facilitate wide acceptance of the Code. The major problems in defining crimes concerned the crime of aggression, which, in his view, should be included in the Code and subject to the jurisdiction of the future international criminal court. In that regard, he appreciated the effort made by the Special Rapporteur to provide a new text for article 15. The definition given in paragraph 2 of that article should be accompanied by a list of specific acts of aggression. At the same time, a proper balance should be struck between the independence of the judicial body entrusted with the prosecution and punishment of aggression, and the primary responsibility attributed by the Charter of the United Nations to the Security Council for the maintenance of international peace and security.

67. As for the other crimes included in the current list, his delegation agreed with the Special Rapporteur that the definition of genocide should be based on the one contained in the Convention on the Prevention and Punishment of the Crime of Genocide. It also welcomed the new title, "Crimes against humanity", and the content of article 21. Article 22, on war crimes, conformed to established international practice. His delegation also agreed with the decision of the Commission to establish a working group to examine the possibility of covering in the draft Code the issue of wilful damage to the environment. Recent developments sufficiently justified the insertion of that type of crime in the draft Code.

68. Together with the definition of crimes, the question of penalties was crucial both for the preparation of the draft Code and for the establishment of an international criminal court. Respect for the principle of nulla poena sine lege was no less important than respect for the principle of nullum crimen sine lege. The Code's provisions on penalties should be consistent with the corresponding provisions of the statute of the international criminal court. Maximum and minimum limits could be set for each crime, according to its seriousness, and national courts or the international criminal court could exercise discretion within those limits. As an alternative, the applicable penalties could be established with reference to the national legislation of the State in which the crime had been committed. In any event, the application of the death penalty should be expressly excluded. If necessary, the Commission should be allowed to review some of the provisions of the court's statute in the light of the final outcome of its work on the draft Code of Crimes.

69. The report submitted by the Special Rapporteur on State succession and its impact on the nationality of natural and legal persons, addressed a topic that stood at the crossroads of three significant branches of international law: nationality law, the law of State succession and human rights law. He agreed with the Special Rapporteur's recommendation that the Commission should deal separately with the nationality of natural persons and that of legal persons and should concentrate first on the former, given its special relevance for

compliance with international human rights law. The question of the limitation imposed by international law on the freedom of States with regard to nationality was also of crucial importance, both with respect to the power of the predecessor State to deprive the inhabitants of territory it had lost of its nationality and to the obligation of the successor State to grant its nationality to such individuals. The problems of nationality arising in the context of different types of territorial change should be addressed on a case-by-case basis in relation to the characteristics of the various types of succession.

70. The Special Rapporteur on the law and practice relating to reservations to treaties had underlined the ambiguities and gaps in the system established by the Vienna Conventions and had identified the questions to be addressed in the Commission. His delegation agreed with the Special Rapporteur's conclusions. It also welcomed the Commission's decision to authorize the Special Rapporteur to prepare a questionnaire on the practice of States and international organizations in the field of reservations to treaties. The replies to the questionnaire would be extremely useful in clarifying the problems encountered in that area and in identifying possible solutions.

71. The Commission should devote special attention to reservations to human rights conventions. The need to fill in the gaps in the Vienna Convention regime with respect to those treaties was particularly urgent. He also agreed with the Special Rapporteur's idea of drafting model clauses to be included in human rights conventions.

72. With regard to the Commission's programme of work, he said that it would be extremely useful to allow at least three weeks of concentrated work in the Drafting Committee at the beginning of the forty-eighth session. The suggestions by the Commission concerning the two new topics, entitled "Diplomatic protection" and "Rights and duties of States for the protection of the environment", were very helpful. In considering such topics, it would be essential to avoid duplication of the work being done by the Commission under other topics. Therefore, the proposed feasibility study on the law of the environment should concentrate on identifying those aspects not being considered under the topic of international liability.

73. Mr. RAO (Chairman of the International Law Commission) said that the Commission must speed up its work on the topic of "International liability for injurious consequences of acts not prohibited by international law" and give priority to "The law and practice relating to treaties" and "State succession and its impact on the nationality of natural and legal persons".

74. The Commission must formulate the criteria which should guide it in its work, which was the codification and progressive development of international law. In order for the Commission to carry out its work effectively, the greatest possible number of groups of States must participate in that work, and they must be given an opportunity to do so.

75. It must be borne in mind that the main objective of the codification and progressive development of international law was to promote international cooperation with a view to encouraging universal respect for the human rights

and fundamental freedoms of all, without distinction, and to settle disputes that threatened peace by peaceful means. Finally, the objectives of the Commission and of the General Assembly were to promote and identify principles of international law that were universally accepted and that reflected the interests and aspirations of the widest measure of peoples. That task was time-consuming and required patience, tolerance and a spirit of accommodation. The desire to speed up the work of the Commission was clearly legitimate, although the slow pace was not without its value. In any case, the Commission was nothing but an agent of the General Assembly; therefore, any criticism reflected also on the Assembly itself.

76. The consideration by the General Assembly of the Commission's reports, together with the participation of the Chairman and other members of the Commission in sessions of the Assembly, promoted a useful dialogue between those bodies. The comments made in the General Assembly were carefully summarized and transmitted to the Commission, so that it could use them in carrying out its work, which included reviewing its working methods. Unfortunately, the crisis in the Organization threatened to prevent the Chairman and other members of the Commission from attending General Assembly sessions and meetings of other bodies concerned with international law to which the Commission reported on its work. He hoped that the Government of India, the Under-Secretary-General for Legal Affairs and the Director of the Codification Division would find a way to solve that problem.

The meeting rose at 1.05 p.m.

UNITED NATIONS

General Assembly

FIFTIETH SESSION

Official Records

SIXTH COMMITTEE
24th meeting
held on
Friday, 27 October 1995
at 3 p.m.
New York

SUMMARY RECORD OF THE 24th MEETING

Chairman: Mr. LEHMANN (Denmark)

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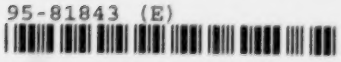

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The meeting was called to order at 3.15 p.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

1. Ms. BOUM (Cameroon) said that little progress had been made on the topic of State responsibility since the Commission had first taken it up in 1955. It was therefore gratifying that the Commission had decided to complete the first reading of the draft articles on that topic at its next session, in 1996.

2. Her delegation regretted the inclusion in the draft articles of provisions on countermeasures. Although the Commission had tried in articles 13 and 14 to regulate the use of countermeasures, her delegation feared that the use of countermeasures would give rise to many abuses and would be subject to varying interpretations.

3. Her delegation supported draft articles 1 to 7 of part three and the annex thereto in so far as the general system for the settlement of disputes respected the sacrosanct principle of free choice of means laid down in Article 33 of the Charter and the special system aimed to correct the defects inherent in the regime of countermeasures.

4. As expected, the seventh report of the Special Rapporteur had given rise to controversy because the proposals contained in it derived directly from decisions taken by the Commission at the time of the adoption of article 19 of part one of the draft articles. Her delegation supported the approach taken by the Special Rapporteur and endorsed by the majority of the members of the Commission of continuing work on the draft articles of part two, taking into account the decisions taken at the time of the adoption of the draft articles of part one. Any reassessment of specific questions raised by the draft articles as a whole would be carried out in second reading on the basis of the comments and observations of States.

5. Mr. BAXTER (Australia) said that the topic of the law and practice relating to reservations to treaties was one of the most difficult and controversial areas of international law. Part of the difficulty stemmed from certain deficiencies in the rules relating to reservations set down in the Vienna Convention on the Law of Treaties and drawn upon in the Vienna Convention on the Succession of States in respect of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. His delegation encouraged the Commission to focus on finding practical solutions to some of the problems that had been identified and commended the Commission's position that there should be no change in the relevant provisions of the three Vienna Conventions. Any modification of those Conventions was likely to lead to further uncertainty about the rules relating to reservations, as different regimes would then apply between different parties to the same treaties, depending upon whether they had ratified the new rules or not. Such an outcome needed to be avoided.

6. His delegation also supported the Commission's conclusion that it should try to adopt a guide to practice in respect of reservations, which would take

the form of draft articles with commentaries. The preparation of model clauses for particular types of treaties would assist States and international organizations in the negotiation of new treaties and help to harmonize international practice. If it later became apparent that a separate legal instrument would be viable, the guidelines could be transformed into a convention or protocols.

7. Under the traditional unanimity rule, a reservation was not effective unless it was accepted by all the other parties to the treaty in question. The more flexible approach adopted in the Vienna Conventions followed on from the advisory opinion rendered by the International Court of Justice on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. However, that approach appeared to put a State making a reservation in a very favourable position. Since an objection to a reservation excluding the operation of a particular rule did not have the effect of restoring the rule as between the reserving State and the objector, the objection was quite ineffective legally. An objection to a reservation which modified the effects of a rule prevented the reserving State from asserting that its interpretation of the rule had been accepted but did not mean that the objecting State would be able to demonstrate that the rule applied between the two States as if the reservation had not been made.

8. The Commission might wish to consider whether the principle of reasonableness could be included in the guide to practice in respect of reservations. That principle could be used to interpret Vienna Convention rules that might otherwise have arbitrary and unsatisfactory consequences for States reacting to reservations.

9. Another omission from the Vienna Convention rules was a clear guide as to the consequences of a State's failure to comply with article 19 in formulating a reservation. It was not clear whether a State which made a reservation that was prohibited by article 19 was bound to accept a treaty without reservation, or how it would be determined that a reservation contravened article 19. The Commission's study of the "permissibility" and "opposability" schools of thought might provide guidance on those questions.

10. His delegation supported the Special Rapporteur's intention to look specifically at human rights instruments. The question of reservations to human rights treaties was controversial, and it was worth considering whether special principles should apply to the making and interpretation of reservations in relation to rules which protected fundamental human rights.

11. Turning to chapter VII of the Commission's report, which dealt with the Commission's programme of work, his delegation endorsed the proposed timing for the consideration of the topic on reservations to treaties and the recommendation to include the topic of diplomatic protection in the agenda. It supported the proposal to undertake a feasibility study on a topic concerning the law of the environment, since an integrated approach to preventing further deterioration of the global environment might be necessary. However, the Commission should first complete its first reading of the draft articles on State responsibility and second reading of the draft Code of Crimes against the Peace and Security of Mankind.

12. Mr. ROBINSON (Jamaica), referring to the topic of the law and practice relating to reservations to treaties, said that treaties had a great impact on the maintenance of international peace, stability and security. There must therefore be a reasonable guarantee of the integrity and certainty of all aspects of the legal regime of treaties.

13. Universal or near universal participation in multilateral treaties was obviously an objective that was in the best interests of the global community. The technique of reservations facilitated wider participation in such treaties. The fundamental issue raised by reservations was that of balancing the rights and obligations of the reserving State with those of other States parties to a treaty in order to maintain the treaty's integrity. A flexible and pragmatic approach was therefore required.

14. Articles 19 and 20 of the Vienna Convention on the Law of Treaties had a sequential relationship in that article 19 set out the circumstances in which a State could formulate a reservation while article 20 specified the conditions for the acceptance of or objection to a reservation that met the requirements for formulation in article 19. The wording of article 20 suggested that it was the contracting States that would determine whether the requirements of article 19 had been met. Of the three criteria in article 19, compliance with those in paragraphs (a) and (b) could be determined with some certainty, but the question of whether a reservation was incompatible with the object or purpose of the treaty (paragraph (c)) was notoriously difficult.

15. Both the "permissibility" and "opposability" schools neglected the integral, sequential relationship between articles 19 and 20 which together, set the conditions for the validity of a reservation. The question of the implementation of a reservation did not arise until the requirements for formulation in article 19 had been met. However, a reservation which met those requirements was not inherently valid in the sense that it could be implemented, since its validity was ultimately tied to the system of acceptance of and objection to reservations provided for in article 20. He agreed with the permissibility school that an objection could be made only to a permissible reservation, if that meant a reservation that had met the requirements of article 19, but disagreed that there was a unilateral right to determine whether the article 19 requirements had been met, since a reservation that one State held to be plainly incompatible with the object and purpose of a treaty might not be viewed in the same way by another State.

16. It was clear from articles 76 and 77 of the Vienna Convention on the Law of Treaties that, in the absence of any express provision in the treaty or any developed practice, the depositary of a treaty did not have the competence to settle disputes as to whether the requirements of article 19 had been met. The depositary's function was to transmit the reservation to the other States parties without passing judgement on it. In the absence of mechanisms in treaties to resolve disputes between parties as to the validity of reservations, monitoring bodies such as the Human Rights Committee would arrogate to themselves the right to pass judgement on reservations to treaties. His delegation therefore welcomed the identification by the Special Rapporteur of dispute settlement as one of the substantial issues arising out of the

Commission's debate, and welcomed his proposal for the drafting of model clauses for insertion in future treaties.

17. Interpretative declarations were widely - and wrongly - used in modern times. His delegation shared the view that many such declarations were in fact disguised reservations, since they excluded or modified the legal effect of certain provisions of a treaty in their application to the author State. Declarations which met the substantive criteria for reservations set forth in article 2, paragraph (d), of the Vienna Convention on the Law of Treaties must be subject to the same legal regime as reservations, although one result of such an approach might well be an increase in the number of reservations made to multilateral treaties or a decrease in the number of States becoming parties to such treaties.

18. An interpretative declaration differed from a reservation in that it had no legal effect on the other parties even if they raised no objection. If it was not accepted by the other parties, an interpretative declaration would not have any consequence on the interpretation of a treaty within the meaning of article 31 of the Vienna Convention on the Law of Treaties. To the extent that it was accepted by one or more parties to the treaty, it might qualify under article 31, paragraph 2 (b), as an instrument which was part of the context for the purpose of treaty interpretation. Thus, an interpretative declaration belonged to the legal regime of treaty interpretation.

19. He was concerned by the incompatibility between the concept of reservations and the nature of human rights treaties, which had prompted the Special Rapporteur to wonder whether the system of reservations provided for in the Vienna Convention ought to be modified or even abandoned in the case of such treaties as well as treaties on the environment and disarmament. While Jamaica might consider a special regime of reservations for human rights treaties, it did not wish to encourage a growing list of areas requiring special treatment.

20. The Human Rights Committee had recently attacked the consensual system of reservations set up by the Vienna Convention. That Committee felt that it, rather than States parties to the International Covenant on Civil and Political Rights, should determine whether a specific reservation was compatible with the Covenant. It also maintained that an unacceptable reservation was severable in that the Covenant would be operative for the reserving party without the benefit of the reservation. He wondered, however, whether the Committee was not acting ultra vires that Covenant, since no provision of that instrument authorizes it to take such action. Competence to pass judgment on the acceptability of a reservation to the Covenant was neither appropriate nor necessary for the Human Rights Committee in the performance of its functions. Nevertheless, while the Committee's approach was counter to the consensual regime set out in the Vienna Convention, it illustrated the need for mechanisms to resolve differences relating to reservations.

21. Jamaica did not oppose the settlement of reservation disputes by a third party, even a human rights monitoring body, but questioned settlement by a body which did not have that competence under the relevant treaty. As to the Human Rights Committee's proposition that an unacceptable reservation should be severed, he believed that a reservation could conceivably apply even if it had

passed all the tests for acceptance under article 20 of the Vienna Convention. His delegation favoured a special system for reservations to human rights treaties, but that system must balance respect for the consensual basis of any treaty with the fundamental imperative of a human rights treaty. While it might be difficult to settle reservation disputes exclusively on the basis of the Vienna Convention, the possibility of an initial attempt at resolution on that basis should not be excluded. Moreover, the special circumstances of human rights treaties should not divert attention from the need for a system for establishing the compatibility of a reservation with the object and purpose of treaties in general.

22. His delegation favoured a modest approach to the Commission's work on the question of reservations. The system established by the Vienna Convention had worked fairly well, and it would be better to resolve the ambiguities raised by that Convention rather than to change the entire system. The final result could take the form of a treaty such as the Vienna Convention; however, he did not object to the drafting of guidelines which could later be transformed into a treaty, and he supported the drafting of model clauses for future treaties.

23. Mr. AL-BAHARNA (Bahrain), speaking on State succession, said that the principles that every person had a right to a nationality, that no person should be deprived of his nationality, that no person should become stateless as a result of State succession, that a nationality acquired as a result of State succession was effective from the date of succession and that the nationality of a person was that of the strongest attachment were fundamental legal and humanitarian principles which ought to be reflected in the preliminary study on the topic requested by the General Assembly. He agreed with the Special Rapporteur's suggestion that the Commission should adopt a flexible approach to the topic and that the decision on the form of the final instrument should be postponed.

24. His delegation supported the general view in the Commission that the preliminary study should rely on recent State practice, and that due account should be taken of the humanitarian aspect of the question. His delegation supported the general view in the Commission that the preliminary study should rely on recent State practice, and that due account should be taken of the humanitarian aspect of the question. He agreed with the Special Rapporteur's suggestion that the definition of the term "succession of states" as embodied in the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts should be retained and that the Commission should omit cases of unlawful succession from the study. In addition, the Commission should separate the discussion of the nationality of natural persons from that of the nationality of legal persons, dealing first with the former.

25. With regard to the rule of continuity of nationality, the resolution of issues arising between the date of succession and the date when issues of nationality were settled should be deemed to operate retroactively to the date of succession. Although nationality was essentially governed by domestic law, international law imposed certain restrictions on arbitrary actions of the State, and his delegation felt that the Commission should focus on certain negative effects of domestic law on nationality in the event of State

succession. Likewise, the Commission should give greater emphasis to the concept of a genuine link between an individual and his State of nationality.

26. With regard to human rights law, he stressed the importance of limiting the discretionary powers of States in respect of nationality and agreed that the principle of the right to a nationality was central to the Commission's work. The concept of the right of option should be strengthened and clarified but there could be no unrestricted free choice of nationality.

27. He did not agree with the Special Rapporteur's statement that the humanitarian aspect of State succession should not take precedence over other considerations. In fact, such an approach represented the only way of preventing innocent people from being victimized by changes of sovereignty. International law had only a limited role to play in State succession, but it should preclude the successor State from enacting legislation that was unfair to those affected by such changes, and it should not acquiesce in the granting of nationality to those who did not genuinely belong to the successor State. The Commission's function should be to define the limits of State action under international law with regard to the denial or granting of nationality by the successor State.

28. The effect of article 15 of the Universal Declaration of Human Rights was to restrict statelessness and to grant individuals the right to change their nationality. Those restrictions were binding on all States, including successor States, and the Commission should explore the effects of article 15 on State succession. A balance must be struck between the classical norms relating to State succession and human rights issues arising from the application of such norms.

29. With regard to the classification of the operative rules of international law in regard to succession of nationality under both customary and conventional international law, he would have preferred an approach that derived the applicable norms from the corpus of international law. The post-colonial era and recent events in Eastern Europe had yielded much relevant material which the Commission should consult.

30. With regard to the report of the Working Group on State Succession and its Impact on the Nationality of Natural and Legal Persons, he agreed with the views of the Special Rapporteur set out in paragraphs 194, 220 and 221 of the Commission's report. However, he also supported the Special Rapporteur's reservations as expressed in paragraph 221 of the report and approved of the Special Rapporteur's plan for the content of his next report on the topic.

31. Turning to the law and practice relating to reservations to treaties, he said that without the facility of reservations it was doubtful whether so many States would have become parties to the multilateral conventions adopted under United Nations auspices. Consequently, nothing should be done which would be detrimental to the existing regime of reservations to treaties, although improvements could be introduced in the law and practice of reservations to treaties. The right of States to formulate reservations was increasingly being asserted, and there seemed to be a felt need for clarification of the law governing reservations to treaties.

32. The issue of whether reservations should be examined from the point of permissibility or opposability raised questions which had been laid to rest by the Vienna Convention on the Law of Treaties. He opposed any approach that was inconsistent with the pragmatism of that Convention and felt that the questions raised by the Special Rapporteur with regard to the gaps and ambiguities in the Convention were impractical and would probably not lead to consensus within the Commission.

33. The distinction between reservations and interpretive declarations was an academic one: the Vienna Convention on the Law of Treaties provided an adequate definition of reservations, which were acceptable as long as they facilitated wider acceptance of treaties. He supported the Special Rapporteur's suggestion to change the title of the topic from "The law and practice relating to reservations to treaties" to "Reservations to treaties" as well as the modest approach to the rules set out in the Vienna Conventions of 1969, 1978 and 1986, reflected in paragraph 485 of the Commission's report.

34. The preparation of a guide to practice in respect of reservations would be a sensible undertaking. His delegation shared in the general approval of the suggestion to draft model clauses for insertion in future conventions and welcomed the Commission's authorization of the Special Rapporteur to prepare a questionnaire to elicit information from States and international organizations regarding reservations to treaties.

35. With regard to chapter VII of the report, he agreed with the proposal to give priority at the next session of the Commission to completion of the second reading of the draft Code of Crimes Against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. Work on the topic of liability should continue during that session so that the first reading of the draft articles on activities that risked causing transboundary harm could be completed by 1996. He welcomed the establishment of the Working Group on State Succession and its Impact on the Nationality of Natural and Legal Persons, and agreed that the Working Group should be reconvened to continue studying the topic at the forty-eighth session of the Commission.

36. He questioned the wisdom of specifying a five-year period for completion of the Commission's work on the law and practice relating to reservations to treaties and of what form the work on that topic would ultimately take, a decision which should be left to the General Assembly.

37. With regard to the recommendations that the General Assembly should be requested to include the topic of diplomatic protection in the Commission's programme of work and that it should conduct a feasibility study on the law of the environment, he disagreed that the request should be deferred until after the forthcoming elections to the Commission. While it might have been better if that proposal had reached the General Assembly during its forty-ninth session, the proposal should nevertheless be welcomed since it would facilitate the Commission's long-term programme.

38. Ms. WONG (New Zealand) noted that the Sixth Committee's consideration of the report of the International Law Commission had consisted almost entirely of prepared statements at the expense of genuine debate. However, the Committee's role should be to provide policy guidance, and she would welcome any suggestions from the Chairman as to how Committee members might circulate detailed written statements while engaging in a genuine, if less formal, discussion that could offer real guidance to the Commission.

39. New Zealand welcomed the proposal to seek the Commission's views on the question of reform as it approached the end of the quinquennium. The Sixth Committee would also be enriched by having the preliminary views of those members of the Commission who had a particular interest in the law of the environment, which could be conveyed in the report on the work of the forty-eighth session of the Commission. She supported the comments made by the representatives of Japan and Austria on the desirability of a feasibility study on that topic.

40. Mr. SURIE (India) said that the issue of international liability essentially pertained to the liability of States or other entities engaging in industrial and other development activities and any damage that might be caused in the process. Only entities having direct control of an operation or an activity should be held responsible for any consequent damage. He did not believe that such international liability should be directly attributed to a State merely because the activities that caused harm were undertaken in areas under its jurisdiction. The concept of control itself required careful elaboration or clarification, bearing in mind the practices of transnational and multinational corporations.

41. The liability of a State arose when a State acted as an operator in its own right or, alternatively, when it was the entity responsible for exercising due diligence in imposing certain standards of safety, regulation and monitoring. Adequate legal sanctions were necessary to ensure that such activities were also backed by insurance policies and compensation funds. Liability regimes for mass disasters should be organized separately and should have special features. The State should play a role in pursuing claims and ensuring an equitable resolution of the various issues involved.

42. The general principle that a State bore responsibility for harm done to other States for activities conducted within its territory was open to serious debate in cases where a strict chain of causation had not or could not be established. In all other cases, where individual claims were few and otherwise manageable, they should be subject to the tests of tortious liability generally applied in national legal systems. Further, in order to be effective and equitable, any international liability regime called for appropriate standards of harm against which the liability could be judged, and which would naturally vary in accordance with a country's stage of economic and societal development. In that connection, the needs, aspirations and capabilities of developing countries, must be taken into account when developing the principles of international liability, since those countries represented the large majority of the world's peoples.

43. On the subject of the law and practice relating to reservations to treaties, his delegation agreed that the Vienna Conventions should not be reopened. The Commission should not attempt to indicate separate categories of multilateral treaties in an effort to establish different standards within a universal regime of reservations to treaties. Different historical, political, economic and cultural backgrounds and judicial and legal systems were central in explaining why and in what form reservations and declarations to a treaty were formulated by States parties. The only viable approach, then, was to ensure that Vienna legal regime applied uniformly to all treaties.

44. On the subject of State succession and its impact on nationality, he said that the Commission should study the practice of States of all regions on the issue of change or conferment of nationality at the time of State succession. The primary focus should be on avoidance of statelessness. He looked forward to consideration of that issue in the context of legal persons, such as corporate bodies.

45. He agreed with the representative of Brazil that a decision on the topics of diplomatic protection and the rights and duties of States in the field of environment could be postponed until the constitution of the next Commission in 1996.

46. Mr. VILLAGRAN-KRAMER (Guatemala), referring to the conclusions of the International Law Commission's report on the subject of nationality and succession of States, said that his delegation did not consider that a full range of freedoms existed with regard to nationality in cases of State succession. Rather, binding links existed between persons and Sates which were determined by either jus soli or jus sanquinis.

47. The report stated that in the event of division and succession of States, not only did the right to nationality exist, but institutional mechanisms should be in place to enable people to exercise their right to choose their nationality. The right to nationality had obviously entered the sphere of human rights, and he was gratified that many delegations agreed that the Commission should emphasize that aspect of the question.

48. New trends were emerging in that sphere which should be examined by the Commission, such as the question of successive nationalities enshrined in treaties between Spain and certain Latin American countries, under which nationality was granted reciprocally when a national of one State party took up residence in the other party. Some European countries - Italy and Germany for instance - had introduced interesting regulations to govern the relinquishing of a nationality upon naturalization in another State. Thus, the Commission's preliminary study on that important topic would be useful in deciding whether a convention or a declaration on the question would be more appropriate.

49. Taking up the topic of reservations to treaties, he said that Guatemala viewed the Special Rapporteur's proposals on that subject with great optimism. In his delegation's view, a reservation to a treaty was an act of sovereignty and consequently could be regulated only with the agreement of the State formulating the reservation. It could therefore be stipulated in an international treaty that no reservations would be accepted, as in the United

Nations Convention on the Law of the Sea, or alternative agreements could be established to deal with reservations, as in the case of the International Labour Conventions. His delegation believed that the regime set out in the Vienna Convention on the Law of Treaties, was satisfactory and should not be amended. The Commission might issue directives to fill existing lacunae, as the Special Rapporteur had suggested, but it should not elaborate a draft convention since such an instrument would certainly not achieve its desired ends.

50. Similarly, he did not think that a general regime could be formulated to apply to human rights treaties: the jus cogens nature of certain fundamental human rights meant that they could not be reduced or minimized through treaties; moreover, reservations to human rights treaties had proved effective in Latin America and in Africa, creating a much broader normative spectrum and thereby facilitating signature and ratification of those treaties. The Commission could, however, use the method of model clauses to suggest a specific regime for human rights treaties.

51. Some of the topics adopted for consideration by the Commission were not entirely acceptable to the developing countries since they reflected the interests of the developed countries. The environment was a particularly appropriate topic of study, but his delegation had no interest whatsoever in the subject of the diplomatic protection, considering it to be merely an extension of the old concept of liability deriving from harm to foreigners, which had caused major problems in Latin America throughout the nineteenth century.

52. Mr. CEDEÑO (Venezuela) suggested that the International Law Commission's consideration of reservations to treaties should be limited to reservations formulated by States to multilateral treaties, since considering reservations to bilateral agreements would be equivalent to renegotiating those instruments. Predictably, the Commission's discussion of the topic had produced more questions than answers. The regime that had evolved during the years leading up to the adoption of the Vienna Convention on the Law of Treaties in 1969 permitted broader, balanced participation of States in multilateral agreements and accommodated reservations which States considered to be a prerequisite for their participation in those instruments. He wished to emphasize in that connection that no State could be bound without its consent, nor could any reservation be opposed without its consent.

53. Although the Vienna Conventions had certain shortcomings, it was important not to jeopardize international legal stability by formulating new provisions. Most members of the Commission had agreed that there was no need to reopen the debate on those texts, although certain ambiguities required clarification. The Commission should concentrate on the five topics highlighted by the Special Rapporteur in his summary of the debate.

54. With regard to the final form of the Commission's work, a number of possibilities had been suggested: a convention that would reproduce the relevant provisions of the three Vienna Conventions with appropriate modifications; a draft protocol; a guide on the practice of States and international organizations; and model clauses from which inspiration could be drawn when negotiating a treaty. However, the decision as to the form should be deferred so as not to limit the Commission's freedom to explore the topic. For

the time being, the Commission should focus on elaborating a set of draft articles with commentaries, with special emphasis on State practice.

55. The question had also been raised as to whether a single set of rules should be established or whether there was a need for separate systems covering the human rights treaties. The entire matter of separate regimes for different types of instruments should be considered with great care and in the light of new realities. Human rights were fundamental, universal and inalienable and served to protect the individual. Consequently, the instruments relating to them could not be subject to reservations. Nevertheless, his delegation was not entirely convinced of the value of establishing separate regimes for human rights treaties.

56. It was difficult to distinguish between an interpretative declaration and a formal reservation unless such a distinction had been established in the relevant convention, as was the case with the United Nations Convention on the Law of the Sea, under which States might make a declaration for the purpose of harmonizing their internal law with the provisions of the Convention. The Commission needed to make a careful study of the validity and effect of interpretative declarations, international practice with regard to reservations, and international jurisprudence in that area.

57. The practice of making interpretative declarations, considered by some to be hidden reservations, should be more closely linked to States' internal legislation rather than to their desire to establish a treaty relationship with other signatories on the basis of such declarations.

58. Mr. KOURULA (Finland), speaking on behalf of the Nordic countries, said that the Nordic countries shared the views expressed by the representative of Austria with regard to the need to reconsider existing procedures for the codification and progressive development of international law and to strengthen the dialogue between the International Law Commission and the States Members of the United Nations. The Commission should continue to review its methods of work and report its conclusions to the General Assembly in order to create the conditions for a more profound dialogue. It was in the common interest of the Commission and the Sixth Committee to maintain and enhance the relevance of the legal work done within the United Nations.

59. With regard to the topic of the law and practice relating to reservations to treaties, the Nordic countries endorsed the direction in which the Commission was heading. As to the Commission's long-term programme of work, they shared the doubts already expressed regarding the advisability of including a new topic on the agenda or starting a feasibility study in the last year of the Commission as currently constituted.

60. Turning to the topic of State succession and its impact on the nationality of natural and legal persons, he noted that while it had only provided preliminary observations, the Commission had addressed some important questions and members had agreed on certain basic choices.

61. The topic derived from three different branches of international law (the law of nationality, the law of State succession and human rights law), none of

which embraced a clear set of rules. International law provided only a small number of clear and generally binding rules on nationality, which took the form of decisions of international arbitral tribunals and the decision of the International Court of Justice in the Nottebohm case. One classic requirement for granting nationality to natural persons was that they must be genuinely linked to the State in question. State succession was a notoriously fragmented and controversial field of law. Recent trends emphasized the need for practical arrangements rather than abstract principles so as to ensure the stability of legal relations in cases of a change of sovereignty.

62. The most promising approach to the issue of State succession appeared to be basing it on the norms of international human rights law. The Nordic countries thus welcomed the Commission's decision to focus on the limitation on the freedom of action of States posed, inter alia, by their human rights obligations. Humanitarian considerations were in fact more central to questions of nationality than to the issues covered by the two Vienna Conventions on the succession of States, which dealt with other consequences of succession.

63. Although not in force, the two Vienna Conventions had often been referred to in recent cases of State succession. The Commission was therefore justified in choosing to use the definition of succession of States provided therein. The use of the categories of succession included in the 1983 Vienna Convention was equally justified. The concepts of separation of a part of a State and of dissolution of a State were helpful in making practical distinctions between different cases of State succession. Nevertheless, there had been cases where problems with respect to the withdrawal or granting of nationality because of territorial changes had arisen which did not fit into any of those categories. The Commission had had good reason to omit cases of continuity from the scope of the topic because continuity implied absence of succession. Nevertheless, it was important to bear in mind the particularly complex nature of some situations involving a change of sovereignty.

64. State succession did not result in an automatic change of nationality. It was a prerogative of the States concerned to establish their nationality laws. That must, however, be done in accordance with existing human rights standards and other international legal standards which limited the exercise of a State's sovereign powers in the area of granting of nationality. The Nordic countries were pleased to see that the Commission had not only recognized an emerging right to nationality but had also considered placing a concomitant obligation on States to consult and negotiate with each other in order to avoid cases of statelessness. With further elaboration, that might be the most important outcome of the project.

65. Two other questions considered by the Commission merited further attention. The first related to the consequences of non-compliance by States with the principles applicable to the withdrawal or granting of nationality. Although hypothetical, the alternatives proposed in the report of the Working Group on State Succession and its Impact on the Nationality of Natural and Legal Persons were thought-provoking. The second question concerned the issue of protecting the rights of the individual during the transition period, which could be quite long, before successor States adopted their nationality laws.

66. The Commission had decided to give priority to consideration of the effects of State succession on the nationality of natural persons over that of legal persons, in view of the urgency of the former. The Nordic States endorsed that approach: withdrawal or imposition of nationality against a person's will affected the exercise of fundamental civil and political rights and, to a certain extent, economic and social rights; for a legal person, the consequences were mainly economic or administrative. Rules concerning the nationality of legal persons might be more common in State practice and customary law, thus lending themselves more easily to systematization. The Commission's next report, covering both areas, would be welcome.

67. As to the final form the Commission's work on the topic should take, the Special Rapporteur had expressed a clear preference for forms other than a convention: the small number of ratifications of the two Vienna Conventions on succession of States demonstrated the complexity and controversial nature of the subject and led to the conclusion that a comprehensive declaration might not be the best solution. The Nordic countries shared the view that a declaration, a set of guidelines, or perhaps a more ambitious instrument covering a specific issue might be useful in promoting the progressive development of international law in that field.

68. Mr. STEPANOV (Ukraine) said that as a successor State to the former Soviet Union, his country welcomed the Commission's work on the complicated topic of State succession and its impact on the nationality of natural and legal persons. The final decade of the twentieth century had been marked by the emergence of more than 20 newly independent States, which had given rise to legally complicated and unique situations.

69. As a general rule, replacement of sovereignty with respect to territory led to replacement of the nationality of persons living on that territory. In any event, following the disappearance of a State, the nationality associated with it ceased to exist. One question which arose in that connection was whether the successor State should grant nationality to persons residing in the transitional territory. International practice had been based on the assumption that successor States could not ignore the fact that individuals permanently residing in transitional territory had a connection with that territory. Under international customary law, successor States were bound to grant citizenship to all individuals permanently residing in the transitional territory, except those possessing the nationality of a third State.

70. According to the law on succession adopted by his Government in 1991, all citizens of the former Soviet Union who, at the time of the declaration of independence of Ukraine, were permanently residing in its territory were granted Ukrainian citizenship. Under his country's citizenship law, Ukrainian nationals were defined as individuals residing in Ukraine at the time of entry into force of the law, provided such individuals did not have foreign citizenship and had no objection to acquiring Ukrainian citizenship. No time period for refusal of Ukrainian nationality was specified under the law.

71. Proposed modification of the citizenship law, which would eliminate the possibility of refusing Ukrainian citizenship, was currently under review. Such a revision would help avoid the phenomenon of statelessness and would

demonstrate that Ukraine was adhering strictly to international standards in that area.

72. Ukraine was firmly opposed to the deliberate use by a State of the institution of succession to expand its jurisdiction over the territory of other States. Of particular concern were cases where a successor State adopted a citizenship law which provided an artificial extension of its citizenship to citizens of other newly independent States. Such an option of dual citizenship might be used by one successor State for partial or complete absorption of the population of another independent State, which could be detrimental to the independence and sovereignty of newly independent States.

73. Mr. CECE LOUA (Guinea) said that his delegation appreciated the efforts of the International Law Commission to elaborate universally acceptable norms in an area as complex as that of State succession and its impact on the nationality of natural and legal persons. The profound political changes of recent years, in particular the appearance of new subjects of international law following State successions, only highlighted the timeliness and difficulty of the topic. It was therefore understandable that the matter remained at the theoretical level.

74. His delegation welcomed the reference in the Special Rapporteur's report on the topic to the work of international bodies that had concerned themselves with the problem of nationality in relation to recent territorial changes. It also endorsed the commentary to the Commission's report in which it was explained that the term "succession of States" was used to refer exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of the territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event, so that the word "responsibility" did not convey any notion of "State responsibility".

75. By emphasizing the criteria of attachment and a genuine link between the State and the individual, the Judgment of the International Court of Justice in the Nottebohm case provided the definitive foundation for the concept of nationality. Under international law, various legal systems applied the criteria of jus sanquinis and jus soli either individually or in combination in the determination of nationality. The objective in all cases was to avoid statelessness which was, in itself, a violation of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

76. The granting of nationality fell, a priori, within the scope of domestic law. International law served to limit the effects of the granting of nationality with regard to other States. Under most internal legislation, individuals had the right to decide at a certain age whether they would become nationals of a particular State. The attribution of nationality on the basis of jus soli had helped to reduce statelessness.

77. While agreeing with the Special Rapporteur's approach to the question of categories of succession, his delegation was concerned about the creation of nation-States out of a combination of de facto and legal citizenship. In his view, the right of option and referendum should also be available.

78. Determination of the nationality of legal persons gave rise to fewer problems and depended on the type of legal person involved.

79. Further work by the Commission on the subject of dual nationality would be of great benefit to States. Nationality laws in most of the States that had been created as a result of decolonization were dominated by the legislation of the former colonial Power. Yet, in reality, the same population might be distributed throughout many States and be claiming citizenship rights. The objective was not to endorse dual nationality but to formulate rules which would help States improve their own legislation, avoid potential conflicts and reduce or eliminate statelessness.

80. As to the final form the Commission's work on the topic should take, the Special Rapporteur had said that if the Commission wished to lay down certain general principles for submission to States, a declaration would be the appropriate instrument. Declarations had been part of United Nations practice for decades and were one of the best ways of expressing the political will of States. Nevertheless, their legal value was far less than that of conventions, treaties or agreements. His own delegation would prefer a convention as the final form.

81. Mr. DE SARAM (Sri Lanka) said that he agreed with the general approach the Commission intended to take to the topic of State succession and its impact on the nationality of natural and legal persons. He shared the view of other members of the Sixth Committee that the provisions of the 1969 Vienna Convention on the Law of Treaties, repeated in two later treaty instruments, should be maintained. He also agreed that guidelines and, where necessary, model clauses were preferable and realistic choices.

82. In his view, it would be inadvisable to develop special regimes on reservations for different categories of instruments.

83. In approaching the topic of reservations to treaties, the Commission should bear in mind the many important theoretical points which had been made in numerous scholarly studies on the three Vienna Conventions. At the same time, current realities had to be taken into consideration.

84. The proposed questionnaire to be sent to States and to the principal depositaries of multilateral treaties would be of great practical value to the Commission's work. It would provide the Commission with detailed information on State practice and on how various depositaries, within and outside the United Nations system, handled reservations and resolved the inconsistencies that could arise when States deposited unilateral statements.

85. It would be unrealistic to expect Governments not to protect their interests by making reservations, even after a treaty was adopted. It was also reasonable to assume that any Government, in becoming party to a treaty, would not wish to disengage itself capriciously from the object and purpose of that treaty. Thus, it was difficult to believe that States made reservations in bad faith. In practice, States that made non-permissible reservations might well be under the misapprehension that their reservations were permissible.

86. Finally, from the standpoint of preserving the integrity of a treaty, the underlying objectives of a treaty were just as important as the unilateral statements deposited at the time of its signature, ratification or accession.

87. The issue of State succession and its impact on the nationality of natural persons was a particularly complex matter. To alleviate or eliminate difficulties relating to State succession by way of public international law was indeed a worthy cause. The issue of statelessness should be viewed in the light of the concept in public international law that it was for a State to determine who should be accorded its nationality, subject to international obligations, including international humanitarian obligations. Since each situation of State succession had its own factual, legal, emotional and political context, solutions based solely on the enunciation of legal obligations were insufficient to prevent the tragedy of statelessness. It was difficult to legislate in the abstract without important information regarding the practical experience of States in resolving such matters.

88. The scope and purpose of the topic dealing with the rights and duties of States with respect to the environment had yet to be clarified in the light of all that had transpired in the numerous global, regional, subregional and bilateral specialized forums on environmental issues. Although several treaties in that area had entered into force, many fundamental issues of international law as it related to the environment also required clarification. It was one thing to exhort countries to save the environment in General Assembly resolutions but quite another matter to do so by formulating rules that were intended as legal obligations.

89. Mr. Chung Il CHEE (Republic of Korea), referring to the deletion of article 16, which dealt with the crime of the threat of aggression, from the draft Code of Crimes against the Peace and Security of Mankind, said that Article 39 of the Charter of the United Nations referred specifically to "any threat to the peace, breach of the peace, or act of aggression", thereby establishing a rule for intervention by the Security Council. Therefore, if any threat to the peace could be the object of action by the Security Council under the Charter, the threat of aggression, too, could be the object of action by the Council. A threat of aggression could certainly be regarded as worthy of the international community's concern. Events in recent years had shown that planning and preparing for military action eventually led to acts of aggression. Advanced technology made it relatively easy to detect one State's preparations for military action against another State. For that reason, the Commission should reconsider retaining article 16 in the draft Code.

90. On the subject of State succession and its impact on the nationality of natural and legal persons, he said that an individual's right to nationality should be protected as a human right. To deprive an individual of nationality was a serious matter which caused numerous hardships for that person. It was time to take action at the international level on the question of nationality, which had previously been the exclusive domain of States. If nationality was treated as a human right, it followed naturally that the recognition of an individual's right to choose his nationality was consistent with contemporary international law. The right of option in respect of nationality had been evidenced in States practice since the Second World War and incorporated in

international legal instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and his delegation endorsed the Commission's work on that right.

91. In chapter V of the report, the wording of article D of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law did not adequately impose an obligation on States to prevent or minimize transboundary harm. Stronger wording should be added to impose an obligation to prescribe an agreement to take preventive measures.

92. On the question of State responsibility (chapter IV), he said that while it was appropriate to refer to a peremptory norm of general international law in article 14, paragraph (e), of the draft articles, that norm had not been sufficiently crystallized by State practice, nor had there been agreement as to what activities contravened it. That subject required careful consideration.

93. With regard to the law and practice relating to reservations to treaties, his delegation endorsed the views held by the Special Rapporteur as well as his arguments for drafting model clauses and guidelines for the regime of reservations. It was necessary to draw a distinction between interpretive declarations and reservations to treaties, since State practice had often blurred the distinction between the two by deliberately using interpretive declaration as reservations. The time had come to define the nature, limits and legal effect of both concepts clearly so that they could play a useful role as normative rules of general international law. Lastly, his delegation endorsed the conclusions of the Special Rapporteur on the Commission's approach to the rules of reservation, which would be to determine any new rules that might be necessary to complement the 1969, 1978 and 1986 rules without throwing out the old rules, which were certainly not obsolete.

94. Mr. REZAEIAN (Islamic Republic of Iran), speaking in exercise of the right of reply, referred to the remarks made by the representative of Austria concerning the law and practice relating to reservations to treaties and said that objections by States to reservations made by other States were normally addressed through the depositary of the treaty in question. Furthermore, it was not the practice of the Sixth Committee to use its forum to make remarks having political connotations. Dozens of States had signed or ratified the Convention on the Rights of the Child with reservations, including several Islamic countries which had made reservations or declarations similar to those made by his country.

95. Mr. HAFNER (Austria), speaking in exercise of the right of reply, said that it had not been the intention of his delegation to make a political statement, but rather to illustrate one way in which the question of impermissible reservations and the reaction to those reservations could be resolved without creating difficulties in the relations between two States. In fact, his delegation had tried to demonstrate a positive solution to a problem which had not been resolved by the 1969 Vienna Convention on the Law of Treaties.

The meeting rose at 6.05 p.m.

UNITED NATIONS

General Assembly

FIFTIETH SESSION

Official Records

SIXTH COMMITTEE
25th meeting
held on
Monday, 30 October 1995
at 3 p.m.
New York

SUMMARY RECORD OF THE 25th MEETING

Chairman: Mr. LEHMANN (Denmark)

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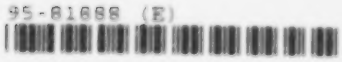

The meeting was called to order at 3.15 p.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

1. Mr. MORSHED (Bangladesh) made a general observation that, while offering a useful point of departure in certain instances, the various references made to municipal law during the discussion on the development of international law did not reflect the relationships between international law and the domestic law of many countries. The example of Bangladesh, which had incorporated crimes regarded as terroristic into its criminal justice system through the learning experience of participating in multilateral conferences and subsequently through its accession to international conventions, illustrated how international law-making was frequently the precursor of domestic law reform. The International Law Commission should therefore have regard to the possibility of its work helping domestic law systems adapt to the ever increasing complexities of international life.

2. His delegation believed that the technical resources available to the Commission were insufficient for the successful fulfilment of its mandate on particular topics. That problem, attributable to many factors, was aggravated by the gentlemanly pace of the Commission's work, which could be rendered out of date due to the failure to keep up with technological advances. Changes in the Commission's working methods and the facilities for accessing state-of-the-art developments in select fields therefore appeared necessary.

3. Concerning chapter II of the Commission's report on the draft Code of Crimes against the Peace and Security of Mankind, his delegation appreciated the rationale behind an irreducible list of "core crimes" that also seemed to animate the open-ended Working Group on the draft statute for an international criminal court. It felt, however, that the relegation of apartheid or institutionalized racial discrimination was retrogressive. The germ of genocide could be discerned in the historical phenomenon of racial discrimination; hence, excluding that crime from the list, weakened the legal defences against it. Furthermore, by its very nature, racial discrimination readily leant itself to systematic state and institutional patronage. He therefore suggested that the crime of apartheid should be restored to the list of "core crimes", while broadening the definition to cover institutionalized racial discrimination.

4. His delegation also supported the restoration of the crime of wilful and severe damage to the environment as a core crime, since the likelihood of such damage occurring was not so remote as to be discounted. Furthermore, it was only by treating such damage as a distinct crime that the institutional weaknesses inherent in international society in that respect could be overcome and the municipal practice of concurrent indictments avoided.

5. Some delegations had emphasized the need for precision in drafting, especially in regard to the draft Code of Crimes against the Peace and Security of Mankind. That precision was necessary for the protection of the rights of accused persons in municipal criminal law systems. At the municipal level, however, it was backed by rules of evidence that enforced discovery and

permitted interrogation. At the international level, the procedures differed and greater opportunities existed for the obstruction of justice through the corruption or suppression of evidence. The search for perfection in drafting was therefore misplaced until procedures could be uniformly assured.

6. The consideration of chapter IV on State responsibility, had provoked considerable debate over the notion of "State crimes". Although it had no ready answer to the various objections posed, his delegation recognized that such a notion could not be easily dismissed in so far as responsibility for a crime could not be systematically attributed to an individual. It commended the observation contained in paragraph 269 of the report that "it was hardly admissible continually to go back on past decisions".

7. Part three of the draft articles, on the settlement of disputes, was of great interest, particularly with regard to the establishment of a stage of compulsory negotiations, which probably offered the most promising route to the amicable settlement of disputes. In a broader context, the Commission could examine the legal consequences of the persistent denial of negotiations and ways of escaping from the resulting impasse. The institution of compulsory third party proceedings was a prerequisite for the democratization of international society and rendered admissible the consideration of "countermeasures".

8. Concerning international liability, his delegation approved of the adoption of articles A, B and D and noted that article C remained a working hypothesis. It also welcomed the reaffirmation of Principle 21 of the Declaration of the United Nations Conference on the Human Environment and Principle 2 of the Rio Declaration on Environment and Development. Portions of the commentary, however, were misleading and the references to the standard of due diligence were misplaced and misconstrued. Due diligence was an objective test and could not be used to amend or abridge the rights of States.

9. His delegation shared the view of the Special Rapporteur, who explained that the most appropriate remedy for harm to the environment was the restoration of the environment. It also urged the Commission to recognize that damage to the environment was becoming increasingly irreversible and to allow that recognition to shape both the regime of liability and the means of reparation. Lastly, it hoped that the topic of international liability would be treated uniformly in the domain of public international law.

10. Mr. KOLODKIN (Russian Federation) said that the Commission had made satisfactory progress in its work, especially on the two new topics, namely, State succession and its impact on the nationality of natural and legal persons, which had acquired particular importance for his country since the disappearance of the Soviet Union, and the law and practice relating to reservations to treaties. He wished to stress, however, that serious problems remained to be solved. In particular, the draft Code of Crimes against the Peace and Security of Mankind and the draft articles on State responsibility, which the Commission regarded as priorities, gave rise to considerable difficulties.

11. Concerning the draft Code, it appeared necessary to question the relationships between the work carried out in that domain and the work on the draft statute for an international criminal court. When it was submitted to the

General Assembly in 1994, the draft statute had been an instrument of procedural law; together with the draft Code, which came within the realm of positive law, it formed the basis for a penal law. The Commission's recent work had modified that context by endowing the draft statute with a character that came more within the realm of positive law. His delegation therefore believed that the approach to the drafting of the Code should be reviewed and that attention should be focused on the crimes to be included therein, rather than on the definition of the crimes which fell within the jurisdiction of the court.

12. Concerning the draft articles on State responsibility, it appeared that it would be difficult for the Commission to reach agreement on the concept of "State crime" during the current session. On the other hand, it was on the verge of completing its work on delicts. The proposals of the Special Rapporteur on the institutional aspect of crimes did not fully satisfy his delegation, which also had reservations concerning the provisions on the possibility of different United Nations organs determining the existence of a crime and the number of votes necessary for the organs concerned to take a decision. In that regard, it endorsed the remarks contained in paragraphs 306, 307 and 309 of the Commission's report.

13. Although it regarded as justified the distinction between delicts and crimes on the basis of their gravity, his delegation believed that the Commission could not draft the articles on State responsibility satisfactorily unless it decided not to include the concept of responsibility for crimes and focused primarily on completing its work on the question of responsibility for delicts.

14. Such observations led to more general questions concerning the Commission's procedures and working methods and means of enhancing its efficiency. The issue should be considered seriously and the possibility of establishing a working group of the Sixth Committee to perform that task should be envisaged.

15. Mr. AKL (Lebanon) said he welcomed the progress achieved with regard to the draft Code of Crimes against the Peace and Security of Mankind. He approved of the decision to limit the list of crimes to offences whose characterization as crimes against the peace and security of mankind was difficult to challenge, which should facilitate the establishment of a wider consensus among States. However, he appreciated the reservations expressed by some delegations and hoped that such restrictions would be temporary in that the draft Code would be enhanced by being comprehensive.

16. His delegation hoped that intervention and colonial domination and other forms of alien domination would be included in the draft Code. It was also in favour of the definition and inclusion of the crime of "institutionalized racial discrimination" and the establishment of a working group to examine the issue of wilful and severe damage to the environment.

17. It would be appropriate to include in the Code a mechanism for the progressive addition of crimes on which a broad international consensus might one day emerge. It would also be necessary to harmonize the provisions of the text, particularly the definition of crimes, with those of the draft statute for

an international criminal court in order to avoid differences or contradictions which might interfere with the functioning of the future court.

18. With regard to article 15, which dealt with the crime of aggression, this delegation supported the text adopted by the Commission on first reading, which was based on the definition adopted by the General Assembly in its resolution 3314 (XXIV) of 14 December 1974. With regard to article 19, it supported the proposal of the Special Rapporteur to include the crimes of complicity and the attempt to commit genocide in the definition of genocide. Furthermore, it felt that the last subparagraph ("All other inhumane acts") of draft article 21, concerning crimes against humanity was too imprecise to be included in a criminal code. Lastly, the words, "the establishment of settlers in an occupied territory and changes in the demographic composition of an occupied territory" and "attacks against civilian populations" should be added to article 22, concerning war crimes.

19. His delegation agreed with the Special Rapporteur that a more precise definition of international terrorism must be provided with a view to including that crime in the Code and to eliminating it on a global scale. But it would be essential to include in article 24 a saving clause similar to paragraph 7 of the draft article on the crime of aggression adopted by the Commission on first reading.

20. Turning to chapter VI of the Commission's report, entitled, "The law and practice relating to reservations to treaties", he said that the legal norms regarding reservations set forth in the 1968 Vienna Convention on the Law of Treaties were generally satisfactory and corresponded to State practice. He did not approve of the position adopted by the Human Rights Committee, which tended to limit the right of States to formulate reservations in order to protect interests that they considered essential. The consent of States to be bound by treaty provisions remained a basic principle. It was for that reason that the rules concerning reservations set forth in the Vienna Conventions of 1968, 1978 and 1986 could not be called in question, even if it sometimes seemed essential to complement or clarify them.

21. It seemed necessary, as the Commission had suggested, to adopt guidelines and model clauses on reservations in the form of draft articles which would serve as a guide to States and international organizations on that matter. The decision with regard to the form which the results of the Commission's work would take should be left to a later stage. Lastly, it seemed appropriate to change the title of the topic to "reservations to treaties", as the Special Rapporteur had proposed.

22. With regard to the Commission's programme of work, his delegation felt that the recommendations in chapter VII of the report were satisfactory. In particular, it supported the recommendations to include the issue of diplomatic protection in the agenda and to begin a study of the law of the environment. The proposals for improving the rhythm and results of the Commission's work deserved to be examined with great care.

23. The CHAIRMAN said that the Committee had concluded its debate on agenda item 141.

AGENDA ITEM 142: ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT (A/50/22)

24. Mr. BOS (Chairman of the Ad Hoc Committee on the Establishment of an International Criminal Court), after briefly summarizing the history of a question which had concerned the international community for nearly half a century, said that the draft statute for an international criminal court presented by the Commission (A/49/10) had assumed even greater importance because the need for such a jurisdiction had been confirmed by the decision of the Security Council to establish ad hoc Tribunals for the former Yugoslavia and for Rwanda. At its forty-ninth session, the General Assembly had established an ad hoc committee to review the major substantive and administrative questions arising out of the draft statute prepared by the Commission (resolution 49/53) and the arrangements for the convening of an international conference of plenipotentiaries.

25. The report of the Ad Hoc Committee (A/50/22), which had held two sessions in 1994, included four parts. Since part I was self-explanatory, he reviewed the principal questions examined in part II, which was subdivided into six sections.

26. With regard to section A (Establishment and composition of the court), the members of the Ad Hoc Committee had agreed that the future court should be established by means of a multilateral treaty and that a close relationship must be ensured between the court and the United Nations, possibly by means of a special agreement. They had felt that two other questions deserved further consideration: on the one hand, the qualifications of the judges and their mode of election and, on the other, the content and method of adoption of the rules of procedure and evidence (paras. 12-28).

27. Since the principle of complementarity, which was the subject of section B, was an essential characteristic of the establishment of an international criminal court, the Ad Hoc Committee had stressed the need to consider its practical application at all stages, from the initial investigation to the enforcement of the sentence. That principle must also be examined in relation to the exercise of jurisdiction by national courts, particularly with regard to the nature of exceptions, the exercise of national competence, the authority competent to decide on such exceptions and the question of when such decisions should be made. He felt that those issues, and others, would be much easier to resolve if the scope of the court's jurisdiction was limited to a few "core crimes" (paras. 29-51).

28. In section C, the Ad Hoc Committee analysed issues relating to the jurisdiction of the court, in particular applicable law which, it was generally felt, required further consideration (paras. 52 and 53). The question of the crimes to be covered by the statute and the definition of those crimes was of unparalleled importance because it would determine the role of the future court within the international legal order, its relationship to national criminal justice systems and the support which it would receive. Nearly all the delegations had felt that genocide, serious violations of the laws and customs applicable in armed conflict, including the 1949 Geneva Conventions and crimes against humanity met the criteria for inclusion under the jurisdiction of the

court. However, there was less agreement regarding the crime of aggression and treaty-based crimes.

29. It had been suggested that a mechanism for periodic review of the list of crimes falling under the court's jurisdiction should be added to the statute so that the list would continue to meet the needs of the international community. That option would have the advantage of limiting the court's jurisdiction, at least in an initial phase, to a small number of "core crimes". With regard to the specification of crimes, it had been noted that the crimes must be precisely defined and that the constituent elements of each crime over which the court would have jurisdiction must be specified.

30. The Ad Hoc Committee had examined other issues relating to the exercise of jurisdiction, including inherent jurisdiction, the mechanisms for acceptance by States, State consent requirements and conditions for the exercise of jurisdiction, the mechanism for triggering the exercise of jurisdiction, the role of the Security Council and the statute of limitations. All of those questions, particularly the relationship that should exist between the court and the Security Council, had been considered of the greatest importance (paras. 90-127).

31. In section D (Methods of proceedings: due process), the Ad Hoc Committee had considered some extremely complex and technical issues. The discussion had made it clear that the role of the president and that of the prosecutor called for further consideration, as did the respective roles of the court and the national authorities with respect to investigation and prosecution (paras. 128-194).

32. The relationship between States parties, non-States parties and the international criminal court, which was the subject of section E, was of particular importance since the effectiveness of the court would depend largely on the cooperation of national authorities. The discussion had indicated that part VII of the draft statute and the question of concurrent treaty obligations deserved further study (paras. 195-243).

33. With regard to the budgetary aspects which were dealt within subsection F, three main trends had emerged during the debate. One trend favoured financing the court from the regular budget of the United Nations; another supported financing of the court by the States parties to its statute; yet another considered it too early to discuss budgetary matters in detail (paras. 244-249).

34. Noting that section III of the report dealt with arrangements for the convening of an international conference of plenipotentiaries and was self-explanatory, he turned to the conclusions of the Ad Hoc Committee which were reflected in section IV of the report. Although considerable progress had been made on key issues such as complementarity, jurisdiction and judicial cooperation between States and the international criminal court, further work remained to be done on the draft statute of the court. The Committee felt that discussion of issues could be combined with the drafting of texts with a view to preparing a consolidated text to be considered by a conference of plenipotentiaries. Emphasizing the importance of encouraging the broadest possible participation of States in order to ensure the effectiveness of a

future international criminal court, he encouraged as many States as possible to participate in the discussions.

35. Mr. OWADA (Japan) said that despite the reawakening of hatreds and rivalries that had remained dormant throughout the cold war, the complex problems posed by the establishment of an international criminal court should be studied responsibly and calmly. The establishment of such a body would be a revolutionary leap in the history of the codification of international law. Great care must therefore be taken to ensure that such an institution would function effectively and meet the expectations of the international community, and especially those who needed the court most.

36. Since his Government's views had already been explained in detail in document A/C.6/49/3, he would confine his remarks to a few aspects of the draft to which his delegation attached great importance: complementarity, crimes to be covered by the statute and specification of crimes; and the exercise of jurisdiction and respect for fundamental human rights.

37. The principle of complementarity was of cardinal importance to the statute because, under normal circumstances, it was safe to assume that a national judicial system was highly developed with regard to both substantive laws and the manner in which it was organized, and that it could deal with most crimes. It should be remembered that the four Geneva Conventions of 1949 and other international treaties were based mainly on the principle of cooperation among national judicial systems, a principle embodied succinctly in the phrase aut dedere, aut judicare. In addition, although the establishment of an international criminal court was anticipated by article 6 of the 1948 Genocide Convention, the supremacy of the international court was not stipulated. Saddling the international criminal court with an unrealistically ambitious role would risk jeopardizing both the universal accession of States to the statute and the court's effectiveness.

38. The jurisdiction of the court should be limited to "core crimes", such as genocide, serious violations of the laws and customs applicable in armed conflicts, crimes against humanity and crimes under the four Geneva Conventions. Those were typical crimes most likely to be committed in an armed conflict, when national judicial systems did not function properly. Crimes under article 20 should be made more specific so as to avoid any ambiguity concerning the court's jurisdiction.

39. As for the case of aggression addressed in article 20 (b), Japan did not share the view expressed by the International Law Commission; the definition given by the General Assembly in 1974 had not been formulated for the purpose of determining the criminal responsibility of an individual, and it would be difficult to prove that any one person was responsible for such aggression. In addition, if the court dealt with the crime of aggression, that would immediately raise the delicate question of the relationship between the court and the Security Council; on the one hand the utmost caution would be required in order to guard against possible inconsistencies between the judgements of the Security Council and the court; on the other hand, the court would have to maintain its independence from the Security Council.

40. Crimes of terrorism, crimes against internationally protected persons and crimes related to torture and trafficking in narcotic drugs should be left with national judicial systems.

41. Japan was sceptical about the wisdom of extending "inherent jurisdiction" on genocide to the court because the concept of inherent jurisdiction ran counter to the principle of complementarity. The mechanism proposed in article 21, paragraph 1 (b), was quite justified and there was no valid reason for expanding the number of States entitled to lodge a complaint beyond the State where the alleged crime was committed, the State of nationality of the suspect, the custodial State and the State of nationality of the victim.

42. The requirements of the principle of legality, nullum crimen sine lege, and nulla poena sine lege, must be fully respected. That was all the more important in the case of the proposed court, in whose proceedings an accused individual would be exposed to the scrutiny of the entire international community. Due process of law whether in respect of investigative procedures, rules of evidence and trial and enforcement procedures, was so fundamental that it should be stipulated as an integral part of the statute. In addition, provisions covering the applicable law and the prohibition on retroactive application should be examined further.

43. In conclusion, he suggested that in the future there should be an interval of at least one month between meetings of the Ad Hoc Committee, to allow delegations sufficient time to hold the necessary bilateral and multilateral consultations.

44. Mr. McRAE (Canada) stated that the recent tragic events which had so affected world opinion had highlighted the urgent need to proceed with the establishment of the court. Giving the example of the ad hoc international tribunals created to judge atrocities committed in the former Yugoslavia and in Rwanda, he said that their establishment by the Security Council left them open to the criticism that they could not be completely impartial and independent or completely free from political considerations. Indeed, the ad hoc status of those tribunals could also lead to jurisprudential inconsistency or to the exercise of selective justice. It would therefore be preferable to put into place a permanent, universally established and accepted body to respond to such crises in the future.

45. The fact that situations which gave rise to crimes against humanity, in the broadest sense of the term, were constantly being brought before the Security Council, created a conceptual link between the Council and the proposed court, as was clearly illustrated by the proposal to include aggression as a crime which would fall within the jurisdiction of the court. The Security Council took political decisions that had legal consequences, but that did not mean that the court could not operate in an independent and impartial manner. Nevertheless, a treaty-based court, despite having broad international acceptance, could not have the decisive short-term impact of a tribunal established by a resolution of the Security Council that was binding on all members of the United Nations. The statute of the court should therefore not only allow for jurisdiction in cases referred by the Security Council but also recognize the authority of the Council to oblige all Members of the United

Nations to cooperate with the court and require States parties to the statute of the court to bring alleged war criminals to justice. It should no longer be necessary for the Council to create ad hoc tribunals once the statute of the court had entered into force after achieving the minimum number of ratifications.

46. Since the Ad Hoc Committee had fulfilled its mandate as set out by the General Assembly, the time had come to advance to the next step in the negotiations and establish a preparatory committee to prepare a text on the statute of the court for adoption at a conference of plenipotentiaries. Sufficient time should be allotted, there should be the broadest possible representation of Member States and sessions should be shorter and concentrate on specific issues. Those issues should also be differentiated according to whether they needed further substantive discussion or were sufficiently resolved to go on to the drafting phase. The Chairman could conduct informal consultations on those questions. Some issues before the preparatory committee certainly merited further substantive discussion but it should be remembered that the main business of the Committee was to draft texts.

47. The diplomatic conference to adopt the statute of the permanent international criminal court should be held as early as possible, preferably some time in 1997. Canada expressed its gratitude to Italy for its generous offer to host the conference.

48. Mr. YAÑEZ-BARNUEVO (Spain), speaking on behalf of the European Union, welcomed the report of the Ad Hoc Committee (A/50/22) and the conclusions contained therein.

49. The European Union welcomed the increasingly active support of Member States for the establishment of an effective international criminal court, to respond to atrocities committed throughout the world. The experience of the two international ad hoc Tribunals established by the Security Council under Chapter VII of the Charter would be extremely useful in that connection.

50 The court should be a permanent and independent institution and the principle of complementarity should be clearly reflected in the statute. The crimes within the court's jurisdiction and the general rules of criminal law applicable by the court should be defined clearly. Particular attention should be paid to defending the rights of the accused and to proper standards of due process.

51. The European Union considered that the work in hand should be continued until a conference of plenipotentiaries had adopted a consolidated draft convention, for subsequent signature by Member States, and supported the recommendations of the Ad Hoc Committee, particularly those concerning future work. In that connection, it would be useful to establish a preparatory committee to deal in greater depth with the major substantive and administrative issues arising out of the draft statute.

52. The European Union was convinced that establishment of an international criminal court would help to create a more just international order, and urged as many Member States as possible to participate in that endeavour.

53. Mr. FERRARIN (Italy) said that the time had come to speed up the preparatory work and start a negotiating process which would culminate in the adoption of the statute for the international criminal court by an international conference of plenipotentiaries.

54. The court should be an independent, permanent institution, with the widest possible participation of States, and closely linked to the United Nations. It should be complementary to national systems of criminal justice; it was not intended to exclude national jurisdictions, but essentially to provide a forum for the trial of persons accused of crimes of great international concern when recourse to national jurisdiction might be unavailable or ineffective.

55. A balanced approach towards complementarity should be adopted, not only to safeguard the primacy of national jurisdiction, but also to prevent the jurisdiction of the court from becoming merely residual to national jurisdictions. Placing excessively stringent conditions on the exercise of the court's jurisdiction would limit its ability to fill in the gaps in national judicial systems. Moreover, it was the court's responsibility to determine whether conditions existed for a given national legal system to prosecute and try the alleged perpetrators of a crime.

56. As to the crimes to be covered by the statute and their specification, the court should have jurisdiction only over the most serious crimes of concern to the international community as a whole, namely genocide, aggression, serious violations of the laws and customs applicable in armed conflict, and crimes against humanity. Moreover, consideration should be given to extending the jurisdiction of the court to certain treaty-based crimes, such as torture and the offences dealt with by the Convention on the Safety of United Nations and Associated Personnel.

57. His delegation strongly supported the inclusion of aggression among the crimes falling within the jurisdiction of the court; the difficulties in defining aggression for the purposes of criminal law should not be allowed to send a signal of clear regression with respect to the Nüremberg Charter. A proper balance should be found between the essential independence of the court in prosecuting and punishing aggression, and respect for the primary responsibility attributed to the Security Council for the maintenance of international peace and security.

58. The system of conditions for the exercise of the court's jurisdiction envisaged by articles 21 to 23 of the draft statute were, in general, acceptable to his delegation, which considered it as reflecting an attempt to reconcile the quest for consensus with community interests. However, some questions required further reflection, particularly extension of the inherent jurisdiction of the court, the possible initiation of investigation or prosecution by the prosecutor, the opting-in versus the opting-out approach, and the role of the Security Council. He was not in favour of restricting the number of eligible complainant States or of extending the number of States whose consent was required for the exercise of the court's jurisdiction.

59. The paper prepared by the Working Group established by the Ad Hoc Committee served as an excellent basis for the discussion of procedural methods,

particularly the protection of the fundamental rights of the accused. Special attention should be devoted to the question of penalties and respect for the nulla poena sine lege principle. He commended the fact that the draft statute excluded capital punishment.

60. The international conference of plenipotentiaries, which Italy would be honoured to host, should take place by 1997. He supported the prompt establishment of a preparatory committee which should meet for at least six weeks during 1996, ideally in three sessions, with an agenda that was clearly indicated in advance, in order to allow different experts to attend the relevant meetings. The work should concentrate on drafting the articles of the statute and on preparing a consolidated draft text of a convention on the establishment of an international criminal court. The preparatory committee should conclude its work during 1996 and report to the fifty-first session of the General Assembly.

61. Mr. LEGAL (France), commenting on the report of the Ad Hoc Committee (A/50/22), welcomed the fact that an increasing number of countries were in favour of restricting the court's jurisdiction rationae materiae to a "core" of particularly heinous crimes, an approach in line with the original motive for creating a court which would also serve to limit the resultant transfer of sovereignty. With regard to the crime of aggression - which might more accurately be termed the planning, preparation, and launching by individuals of aggression committed by one State against another - the establishment of the court's jurisdiction should be dependent on the prior determination by the Security Council of the existence of an act of aggression.

62. Since the Ad Hoc Committee was in favour of a "core" of crimes, the court's jurisdiction should be "automatic", meaning that after becoming a party to the statute, a State could no longer independently exclude a given crime from the court's jurisdiction. That approach would provide the advantages of simplicity and clarity, while guaranteeing identical jurisdiction of the court vis-à-vis all States parties to the statute, which was an essential foundation of its credibility.

63. One of the pending points, requiring in-depth work, was the attribution of jurisdictions between national courts and the international court, which was the central aspect on which transfers of sovereignty to the international court would depend. His delegation supported making the jurisdiction of the international court concurrent with that of national courts. The natural purpose of national jurisdictions was to prosecute and judge the alleged perpetrators of the crimes in question. However, it therefore followed that if, in the court's opinion, the State responsible for judging such crimes failed to do so or if its judicial authorities demonstrated a desire to protect the offenders, the international court could exercise its jurisdiction and would have primacy of jurisdiction over the national courts concerned.

64. The question of the surrender of the accused to the court was another point that had not yet been examined in any depth. In that context, it would be preferable to refer to the "transfer" of a person at the request of an international judicial body, rather than of "extradition", a procedure which involved two States. The question was not purely one of terminology but

involved the whole issue of relations between the future international court and States parties to the statute, which was still under discussion.

65. Two possibilities had been mentioned regarding further work, the first to extend the mandate of the Ad Hoc Committee, and the second to convene a preparatory committee for the conference of plenipotentiaries. His delegation supported the convening of a preparatory committee which would report to the fifty-first session of the General Assembly. That Committee's mandate should include the drafting, on the basis of the draft statute prepared by the Commission, of agreed guidelines dealing, for instance, with the court's jurisdiction rationae materiae, the establishment of its jurisdiction, and other pending issues, with a view to preparing a consolidated version of the draft. The date of the conference of plenipotentiaries should be fixed on the basis of a very broad consensus among Member States. The establishment of an international criminal court constituted a landmark project and, as such, should reflect true understanding among States.

66. Mr. CHEN Shiqiu (China) said that despite the consensus reached on certain points by the Ad Hoc Committee during its deliberations, major differences remained on questions such as the nature of the future court, the application of the principle of complementarity, the crimes that would come under the court's jurisdiction, the exercise of that jurisdiction, the role of the Security Council and so on. For the time being it would therefore be premature to set a date for a diplomatic conference or to begin preparing for that conference. In the meantime delegations could continue to consider the substantive questions related to the draft statute, giving priority to the most important ones. To that end, China therefore proposed that the General Assembly should extend and expand the mandate of the Ad Hoc Committee.

67. If the court was to have as broad a base as possible and was to function effectively, it would be essential to facilitate participation by the greatest possible number of countries (especially developing countries, which did not always have the necessary human and financial resources) in the work of the Ad Hoc Committee. It would be appropriate to have no more than two sessions per year, each lasting two weeks, and to avoid having more than one working group meeting simultaneously with the plenary.

68. Turning to the report of the Ad Hoc Committee, he said that the main problem to be dealt with was the divergence between national systems of criminal law, which would be further complicated by political, legal and technical questions. The statute for a future international criminal court should embody four basic principles, which he proposed to analyse in turn.

69. The first principle, that of complementarity, was meant to be applied when it was impossible for national courts to formally try someone accused of a serious international crime, although national criminal jurisdiction and the prevailing system of international universal jurisdiction should take precedence. The international criminal court should not supplant national courts, nor should it become a supranational court or act as an appeal court for national court judgements. Any proposal aimed at making it a supranational judicial body would violate the principle of complementarity. It was gratifying to find that the latter had been incorporated in the preamble to the draft

statute, although, regrettably, it had not been fully implemented in the operative part, where some provisions even seemed to contradict it, as in the case of articles 42, 21.1 (a), 25.1, 51.3 (a) and 53.2 (a), which his delegation naturally wished to have corrected.

70. The second principle, that of State consent, was embodied in the draft statute; accordingly, acceptance of the court's jurisdiction would be based on the voluntary consent of the States parties and could not be mandatory. Without the consent and cooperation of the States concerned, especially the State where the offence had been committed and the one where the suspect was present, no international criminal court would be able to carry out its functions. On the question of judicial assistance, the obligation to cooperate stipulated in article 51 was too broad and the element of compulsion was too strong. A case-by-case approach was needed; even States which had accepted the court's jurisdiction should have the right to choose between taking action in a national court and extraditing the suspect.

71. The third principle was that of limited jurisdiction. The jurisdiction of the future court should be limited to the most serious crimes of concern to the international community as a whole. The criteria determining jurisdiction were therefore the universality of the consequences of the crime and the seriousness of the crime. Accordingly, China believed that the Court's jurisdiction should cover genocide, serious violations of the rules of war, and the crimes against humanity listed in article 20 of the draft statute.

72. In the case of the crime of aggression, however, the greatest difficulty lay in how to define it in law, a point on which it had proved difficult to reach agreement. Nor was there agreement on the question of whether individuals could bear criminal responsibility for aggression. As the Charter of the United Nations entrusted the Security Council with the responsibility of determining whether aggression had taken place, the inclusion of that crime in the jurisdiction of the court would have to be handled with the utmost circumspection. Treaty-based crimes (article 20 (e)) likewise needed to be dealt with carefully, as that category of crimes largely overlapped with the category of crimes under general international law and could therefore very well be integrated into the latter. More importantly, some of those crimes did not meet the two aforementioned basic criteria, universality (as in the case of endangering the safety and security of United Nations peace-keeping personnel) and seriousness (as in the case of torture). China was therefore all the more convinced that the court's jurisdiction should be limited to the most serious crimes of genuinely universal concern, which would also prevent the court from being overloaded with cases which could be dealt with by national courts and would alleviate the financial burden on the States parties.

73. The fourth principle was the one expressed in the maxim nullum crimen sine lege, nulla poena sine lege. As the court would operate in the absence of an international penal code, that principle assumed even greater importance; crimes falling under the jurisdiction of the future court would have to be defined clearly, a condition which would not be satisfied by simply invoking the sometimes imprecise definitions of crimes to be found in treaties. By the same token, the law to be applied by the court should be expressly provided for in its statute and should not be simply guided by the rules of the conflict of

laws. Lastly, the draft statute did not have clear provisions for penalties, individual criminal responsibility, procedure and rules of evidence. Some articles would therefore have to be reworked in order to meet the level of precision required by criminal law.

74. China therefore concluded that the principles of complementarity, State consent, limited jurisdiction and nullum crimen sine lege should underpin the operation of the future court. In that case the court would find universal acceptance and would be able to play an effective role. China was ready to work towards that end in the collective interest of the international community.

75. Ms. STEAINS (Australia) said that the success of the Ad Hoc Committee was due to the commitment of delegations to engage in detailed discussion of the critical issues raised by the draft statute for an international criminal court. The establishment of that body was in fact an important step for the international community, and one to which the Australian Government remained committed.

76. After decades of discussion, many questions remained to be resolved, such as the nature of the crimes which would come under the court's jurisdiction, the point at which the court would take over from national authorities, which States would consent to prosecutions, the relations between the organs of the court and national authorities, the procedures in different legal systems for the transfer of suspects and so on. All of those questions required realistic and pragmatic answers, such as the Ad Hoc Committee had already put forward for other issues. For example, it had decided that the court should deal only with the most serious crimes of concern to the international community as a whole.

77. One of the key issues was the relationship between the court and national authorities. The Ad Hoc Committee had used the term "complementarity" to describe the principle which should govern that relationship, but discussion of the matter had not yet been exhausted.

78. Australia believed that the Ad Hoc Committee had completed its task and that the next stage should be the negotiation of the actual text of the statute. Naturally, the negotiations should be based on the draft produced by the International Law Commission and the report under consideration. The report demonstrated that rapid progress could be made if attention was focused on specific issues and the discussions were constructive. For that reason the Ad Hoc Committee should be given a broader mandate. Furthermore, it was time to plan for a diplomatic conference, to be convened in the first six months of 1997 to adopt the statute, following a series of preparatory negotiating meetings in 1996. Governments would then have sufficient time to resolve between themselves the issues arising from the planned establishment of the international criminal court.

The meeting rose at 6.10 p.m.

UNITED NATIONS

General Assembly

FIFTIETH SESSION

Official Records

SIXTH COMMITTEE
26th meeting
held on
Tuesday, 31 October 1995
at 10 a.m.
New York

SUMMARY RECORD OF THE 26th MEETING

Chairman: Mr. LEHMANN (Denmark)

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The meeting was called to order at 10.25 a.m.

AGENDA ITEM 142: ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT (continued) (A/50/22)

1. Mr. KOLOMA (Mozambique) said that the report of the Ad Hoc Committee on the Establishment of an International Criminal Court (A/50/22) raised a number of legal issues which had to be resolved before a decision could be taken with regard to the convening of an international conference of plenipotentiaries. Among the issues which remained to be clarified were: the relationship between the proposed international criminal court and national courts; the jurisdiction of the court, in particular the question of inherent jurisdiction; the crimes to be covered under its statute and the specification of those crimes, questions to be resolved within the framework of the still incomplete draft Code of Crimes against the Peace and Security of Mankind; and the relationship between States parties, States that were not parties and the international criminal court.

2. His delegation fully concurred with the conclusions reached by the Ad Hoc Committee in paragraphs 255-259 of its report. However, the Ad Hoc Committee had remained silent on the question of which body should carry out the remaining work on a consolidated text of a convention for an international criminal court. In his delegation's view, the International Law Commission, which had produced the text of the draft statute for an international criminal court, was in the best position to do so. If, however, it was not possible to entrust the Commission with that task, then it should be given to the current Ad Hoc Committee.

3. The members of the Ad Hoc Committee had disagreed with regard to when the international conference of plenipotentiaries should be convened, the earliest time being 1997. While fully recognizing the urgency of establishing an international criminal court, his delegation was also aware of the large amount of work that needed to be done before the international conference could be convened. It was imperative, for example, to complete and harmonize the draft Code of Crimes and the draft statute for the court.

4. His delegation thus shared the view of those advocating further work on the draft statute and related issues. While strongly supporting the early establishment of an international criminal court, it seriously questioned whether it would be possible to complete the bulk of the work in 1996. In principle, the plenipotentiary conference should not be held until the remaining preparatory work was completed. If that could be done within the next two years, his delegation would have no objection to holding the conference in 1997.

5. Mr. COVELIERS (Belgium) said that his country attached great importance to the establishment of an international criminal court and shared the views of the European Union on that subject. On several occasions his Government had officially endorsed the establishment, as rapidly as possible, of such a court, which would be mandated to bring to justice and punish the perpetrators of particularly serious acts whose odious nature constituted an insult to the conscience of mankind. It had supported the establishment of the two ad hoc tribunals dealing with the situations in the former Yugoslavia and Rwanda and

was contributing to their financing, for it believed that their creation constituted a rapid and indispensable response to the international community's need to punish those who had participated in the perpetration of the horrible massacres in those countries.

6. The establishment of a single, permanent court would obviate the need for ad hoc tribunals for particular crimes, thereby ensuring stability and consistency in international criminal jurisdiction. An international and independent court that was free from political pressures, established on a solid legal basis, accepted by all States to deal with well-defined crimes and capable of offering maximum guarantees to the defendants would provide, particularly where prevention was concerned, an appropriate instrument for dealing with crises which had adverse effects on entire peoples.

7. His country, which had participated in the work of the Ad Hoc Committee on the Establishment of an International Criminal Court, welcomed the progress made in identifying the often complex problems outstanding in that area. Also welcome was the fact that a real consensus existed within the Ad Hoc Committee as to the need to pursue actively their ambitious goal.

8. In terms of its competence rationae materiae, the proposed court should initially have jurisdiction over the most serious crimes: genocide, serious violations of the laws or customs applicable in armed conflict and crimes against humanity. A consensus with regard to limiting the court's jurisdiction, at least initially, to "core crimes" would facilitate its establishment. It would also be useful to incorporate in the statute a clause which would provide, after a fixed time period, for review and extension of the list of crimes under the court's jurisdiction.

9. The principle of complementarity was related to the question of the balance of jurisdiction between the international criminal court and national courts. In order to have effect, that principle would have to be reflected in clear and precise rules. To ensure its prestige, the court should have primacy of jurisdiction, as was the case with the ad hoc tribunals already in existence.

10. The proposed court would operate most effectively if it was not overly restricted by placing prior conditions on the exercise of its jurisdiction. Similarly, the prosecutor should have the power to initiate investigations and prosecutions.

11. The Ad Hoc Committee on the Establishment of an International Criminal Court had honourably discharged its mandate to review the major substantive and administrative issues arising out of the draft statute drawn up by the International Law Commission. The members of the Ad Hoc Committee had agreed that the Committee's mandate should be modified to allow them to move into an active drafting phase, and had so requested the General Assembly.

12. Belgium, along with many other countries, was convinced of the urgency of setting up an international criminal court and hoped that the spirit which had marked the work of the Ad Hoc Committee would be transformed into decisive progress on preparatory activities, in particular the drafting of a convention to be submitted to a conference of plenipotentiaries. In that connection, he

wished to thank the Government of Italy for offering to host the conference, which should be held as soon as possible.

13. Mr. RODRIGUEZ CEDEÑO (Venezuela) said that the proposed international criminal court must function on the basis of the principle of complementarity. The court would exercise its jurisdiction over the crimes specified in its statute provided that the requisite national jurisdictions were unavailable or ineffective and that States accepted its jurisdiction.

14. The purpose of the international criminal court was to punish and prevent particular crimes. To that end, perpetrators of such crimes must be punished by the capturing State, the State of origin, the State in which the crime was committed or an international criminal court. In cases where the international court had jurisdiction, the rules governing cooperation and extradition and transfer of the defendant must be carefully reviewed, bearing in mind States' internal laws and international commitments.

15. The draft statute for an international criminal court must be analysed in the light of both international law and domestic law. The draft statute, as the constitutional text of an international body, had to provide precise rules with regard to its structure and functioning. The statute had to include specific provisions on financial matters, regardless of whether the court would have its own budget or be dependent on that of the United Nations, and staff rules. It might also be important to incorporate in the statute provisions governing relations between States parties and the international criminal court. The administration of the court should be required to report periodically to States parties on the court's functioning and activities.

16. The proposed preparatory committee should review in 1995 the applicable substantive law mentioned in the draft statute, bearing in mind recent developments in international relations. The court's competence rationae materiae was one of the most important substantive issues in that connection. The basic question was whether the list of international crimes over which the court would have jurisdiction should be limited or more extensive. In his delegation's view, article 20 of the draft statute listed the most important international crimes under substantive law, although his delegation had serious reservations about including the crime of aggression.

17. To be effective, the international criminal court should have jurisdiction over a limited number of the most significant international crimes. In that connection, the draft Code of Crimes against the Peace and Security of Mankind could serve as a valid reference for the court where substantive law was concerned. At the same time, it was important to maintain a proper balance between the need for a limited jurisdiction and the need for a statute flexible enough to be modified in response to international developments.

18. The court's jurisdiction should be established within the framework of international law in general and international jurisdiction in particular. States would accept the jurisdiction of the court by becoming parties to its statute and by accepting its jurisdiction in respect of specific crimes. The sole exception was the crime of genocide, over which the court might have inherent jurisdiction.

19. It was widely accepted that the Court should determine its own competence, and that had important implications for the role of the Security Council. The Council played a primary, but not exclusive, role in the maintenance of international peace and security. The establishment of a universal, permanent and effective international criminal court would obviate the need for ad hoc tribunals created on the basis of political decisions. Moreover, the jurisdiction of an international tribunal must not be based on the decision of a political organ. The Security Council had, under the Charter of the United Nations, the authority to call attention to an offence or crime that would be covered in the proposed convention. However, the international criminal court would be empowered to determine its own jurisdiction.

20. The rules of the court should be adopted at the same time as its statute and could be based on the texts adopted in respect of the ad hoc tribunals established by the Security Council and other relevant texts.

21. From the point of view of internal law, the court's statute should be established on the basis of balanced principles and rules that would ensure the requisite harmonization with domestic substantive norms and penal procedures, in particular those pertaining to detention, imprisonment, transfer of the accused, pre-trial release, trials, evidence and sentencing.

22. In the light of the terrible crimes which continued to be committed in various parts of the world, there was an urgent need to establish an international criminal court. The Ad Hoc Committee had fulfilled its mandate. His delegation was therefore in favour of the establishment of a preparatory committee which would elaborate a text to be adopted at the conference of plenipotentiaries. It had no preconceived ideas as to the number or dates of meetings; what was important was to draw up a realistic programme of work that would result in a basic proposal, to be reviewed by the General Assembly at its fifty-first session and submitted to the conference of plenipotentiaries in 1997.

23. Mr. SALAND (Sweden) said that his delegation fully endorsed the statement on agenda item 142 made at the previous meeting by the representative of Spain on behalf of the European Union. Full advantage should be taken of the momentum created by the constructive work of the Ad Hoc Committee; it was time to move on to the drafting of a consolidated text of a convention for an international criminal court. To that end, a preparatory committee should be set up and a decision of principle should immediately be taken to hold, at the appropriate time, a conference of plenipotentiaries to consider the draft convention.

24. Some complex issues remained to be discussed by the preparatory committee. Other more divisive issues could probably be resolved only at the conference itself. The consensus already reached on a number of central issues demonstrated that work on the convention could proceed at an accelerated pace. A decision to move forward with determination would serve the additional purpose of bringing the urgency of the need to establish an international criminal court to the attention of a wider circle of Member States, which was imperative for the endeavour.

25. Sweden believed that the court should be complementary to national criminal justice systems and should be resorted to only when it found that such systems were unavailable or ineffective. The court's jurisdiction should be limited, at least at the outset, to "core crimes", meaning only the most serious offences under general international law. That, in conjunction with the principle of complementarity, would be the basis for the court's inherent jurisdiction. His delegation was attracted by the idea of including a review mechanism which could be used later to broaden the range of crimes within the court's jurisdiction.

26. Penalties must be specified. They should be confined to imprisonment; there was no need to include fines, since the court would adjudicate only the most serious offences. Inclusion of the death penalty would be totally unacceptable to Sweden.

27. The offences under the court's jurisdiction and the general rules of criminal law to be applied by the court must be clearly defined. It was of central importance to ensure full protection of the rights of the accused by setting high standards of due process and clearly defining the obligations of States to cooperate with the court.

28. The establishment of an international criminal court was a matter of great urgency. The United Nations must draw upon the experience gained in establishing the ad hoc tribunals for the former Yugoslavia and Rwanda and build on the momentum generated in favour of a permanent court.

29. Mrs. DASCALOPOULOU-LIVADA (Greece) said that the need for an international criminal court could no longer be questioned. Greece hoped that the establishment of a permanent criminal court would obviate the need to set up any more ad hoc tribunals in the future. While the establishment of such a court was no easy task, the report of the Ad Hoc Committee covered all the underlying principles and issues and pointed to the solutions which should be adopted.

30. The statement made on behalf of the European Union had set forth the general principles which should govern the establishment of the court. She would therefore address some more specific issues.

31. Greece supported the principle of complementarity and believed that it should be interpreted in a restrictive way so as not to make the court's jurisdiction residual to national jurisdiction without further requirements as to the qualifications of the latter. The relevant preambular paragraph of the draft statute should be further qualified in the body of the statute, possibly along the lines of the corresponding articles of the statutes of the tribunals for the former Yugoslavia and Rwanda. Thus the court should be given an opportunity to decide not only whether it had jurisdiction but also whether national jurisdiction satisfied in each particular case the requirements set out in the statute.

32. Her delegation could accept the list of crimes which should be covered by the statute contained in article 20, with the exception of the crimes dealt with in the anti-terrorist conventions because those conventions already provided for a specific system based on the principle of aut dedere aut judicare, which should remain intact. The crime of aggression must be included; it was formally

recognized in the Charter as a violation of a rule of international law with a jus cogens character and had been included in the draft Code of Crimes against the Peace and Security of Mankind. Aggression was a crime that could only be tried before an international tribunal, since in the vast majority of cases national courts of the victim State or States were not able to pass judgement.

33. The question of how to define aggression was not an insuperable obstacle; solutions should be sought in the work of the International Law Commission on the draft Code of Crimes. Her delegation believed that the link between the draft Code and the statute of the court could not be ignored, which was why it supported the proposal that a periodic review should be made of the list of crimes in the draft Code to keep it responsive to the needs of the times.

34. Concerning the involvement of the Security Council in determining whether or not an act of aggression had occurred, her delegation believed that the court should not be barred from exercising its jurisdiction on a particular case if the Council had not decided on the matter. Such a limitation would lead to paralysis and inaction, and had no counterpart in the Statute of the International Court of Justice.

35. The question of inherent jurisdiction was a superfluous notion in the context of a court that would be created by a treaty to which any State could become a party. From a legal perspective, there was no reason to differentiate among the crimes constituting the hard core of criminality; the court should have inherent jurisdiction over all the crimes identified in the statute. On the general question of the definitions of crimes in article 20 of the draft statute her delegation felt that the statutes of the two ad hoc tribunals could provide a useful basis, particularly in connection with serious violations of the laws and customs applicable in armed conflict and crimes against humanity.

36. Her delegation strongly believed that the rules of the court should be formulated in conjunction with the statute and annexed thereto so that States could participate in their elaboration, since many of the rules would have a decisive effect on the functioning and credibility of the court.

37. On the general question of States' cooperation with the court, her delegation felt that States must cooperate of their own accord and in accordance with national law. However, there must be guarantees to ensure that the court had the authority to proceed on its own if national authorities were found to be incapable of providing the necessary cooperation.

38. Her delegation felt that preparations for a diplomatic conference could begin. A preparatory committee or similar body should be set up in 1996 and a diplomatic conference could be scheduled for 1997, so as to take advantage of the momentum that existed.

39. Mr. HILGER (Germany) said that Germany fully supported the statement made by the representative of Spain on behalf of the European Union.

40. Exactly 50 years earlier, in October 1945, the Nürnberg Tribunal had started its procedures against major German war criminals. In 1995, the world had again witnessed devastating crimes albeit on a lesser scale, which could not

be ignored. His delegation welcomed the establishment of the International Tribunals for the former Yugoslavia and for Rwanda as the first steps towards establishing an international criminal jurisdiction, and believed that their creation demonstrated the need for a permanent treaty-based system for such a jurisdiction. The draft statute was a significant achievement, but it needed improvement and adjustments as well as the participation of a larger number of States.

41. His delegation attached importance to the principle of complementarity. Prosecution and punishment must remain the responsibility of the State, and it was only in cases where national trial procedures were unavailable or ineffective that the international criminal court should play a role. On the other hand, the principle of complementarity must not completely dilute the functions of the court and its prosecutors; an appropriate balance had to be struck.

42. His delegation welcomed the tendency to limit the court's jurisdiction to a few extremely serious crimes of concern to the international community. Those "core crimes" should be genocide, serious violations of the laws and customs applicable in armed conflict, crimes against humanity and aggression. The United Nations, which had been created to save succeeding generations from the scourge of war, could not exclude aggression from the jurisdiction of the court. Moreover, the reduced list of crimes proposed for inclusion in the draft Code of Crimes against the Peace and Security of Mankind still included aggression. The Committee would have to consider the relationship between the Code and draft statute.

43. The role envisaged for the Security Council in the draft statute was essential if aggression was to be included, and if the court was to function within the context of the United Nations. The Security Council should have the power to refer a situation or a matter to the court.

44. Germany was in favour of simplifying the complicated opt-in/opt-out system in the draft statute: in becoming party to the statute, a State should accept the court's jurisdiction for the limited number of particularly serious crimes; if national jurisdiction was unavailable or ineffective, the prosecutor should have the power to investigate and prosecute. There should not be too many consent requirements for the functioning of the prosecution or the court.

45. His delegation felt that the rules of procedure should be drafted together with the statute so that they would be available to States that were considering becoming parties to the statute. Existing rules in the field of international criminal cooperation should be appropriately adjusted for the court.

46. Germany was in favour of setting up a preparatory committee as the logical next step towards the convening of an international conference, and of setting a date for the conference.

47. Mr. MOCHOCHOKO (Lesotho) said that the draft statute was a considerable improvement over the earlier draft, but needed to be further strengthened to ensure that it created a just, fair and effective international criminal institution. Lesotho supported the idea of establishing a preparatory committee

to negotiate a draft treaty for the establishment of an international criminal court. The establishment of such a court was long overdue and therefore an urgent priority.

48. Respect for the rule of law, both national and international, could not be maintained unless those who violated the most basic norms of civilized society were brought to justice. His delegation endorsed the view that the primary responsibility for protecting citizens from human rights violations lay with national Governments. However, Governments had frequently been unwilling or unable to take action, and the perpetrators of criminal acts had escaped without punishment. An international criminal court would complement national courts by being able to act where domestic jurisdiction was either unavailable or ineffective.

49. The international community could not undertake the daunting task of establishing ad hoc tribunals whenever civil war broke out. The political uncertainties and delays that characterized ad hoc approaches to a universal problem undermined their effectiveness. Ad hoc tribunals could not be a substitute for a permanent international criminal court with the ability to prosecute persons accused of gross violations of humanitarian and human rights law wherever the crimes were committed. Lesotho therefore welcomed the draft statute as a significant step towards establishing a universal jurisdiction for international crimes.

50. While the court must be able to try people on a broad range of crimes under international law, expanding the court's jurisdiction to include all the crimes under article 20 of the draft statute could dilute the court's authority and credibility. The crimes covered under subparagraphs (a), (c) and (d) were so abhorrent and well recognized under international law that they presented no jurisdictional problems. Limiting the court's jurisdiction to the most serious crimes would promote broad acceptance of the court by States, enhance its effectiveness and facilitate the consideration of other issues pertaining to its establishment. The statute should, however, leave open the possibility of broadening the court's jurisdiction to other "core crimes" as international criminal law developed.

51. The international community would continue to suffer as long as there was no way to bring perpetrators of human rights violations to justice. The obstacles to the establishment of an international criminal court were not insurmountable. Work should be begun on a draft text of a convention for an international court with a view to convening an international conference of plenipotentiaries to adopt such a text by 1997. That would be a first step towards creating a situation wherein the Charter of the United Nations and the Universal Declaration of Human Rights would become part of the body of law on which the world's political and social order was based.

The meeting rose at 11.40 a.m.